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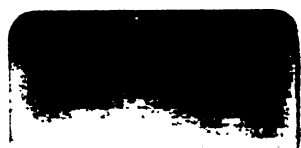
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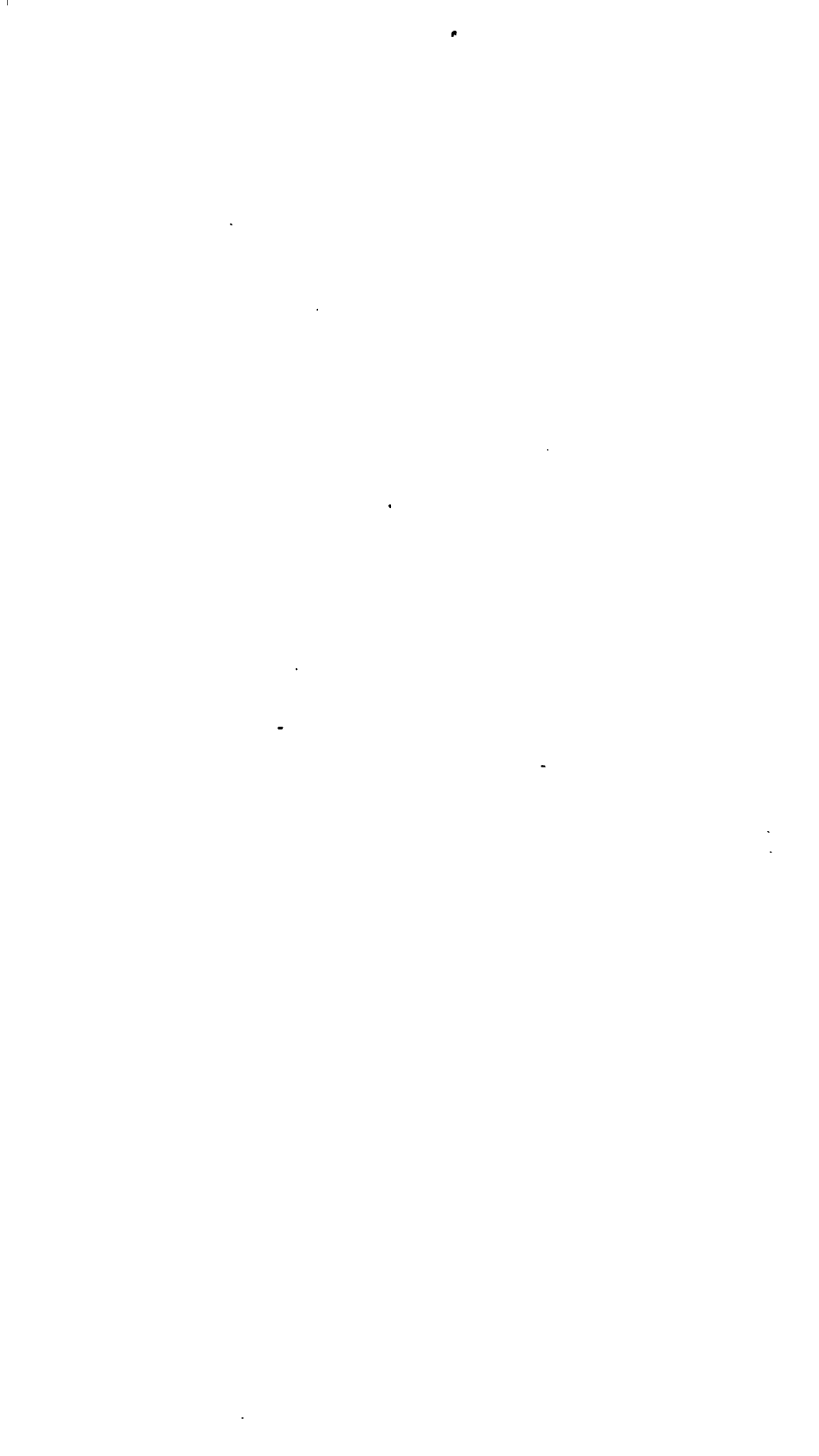


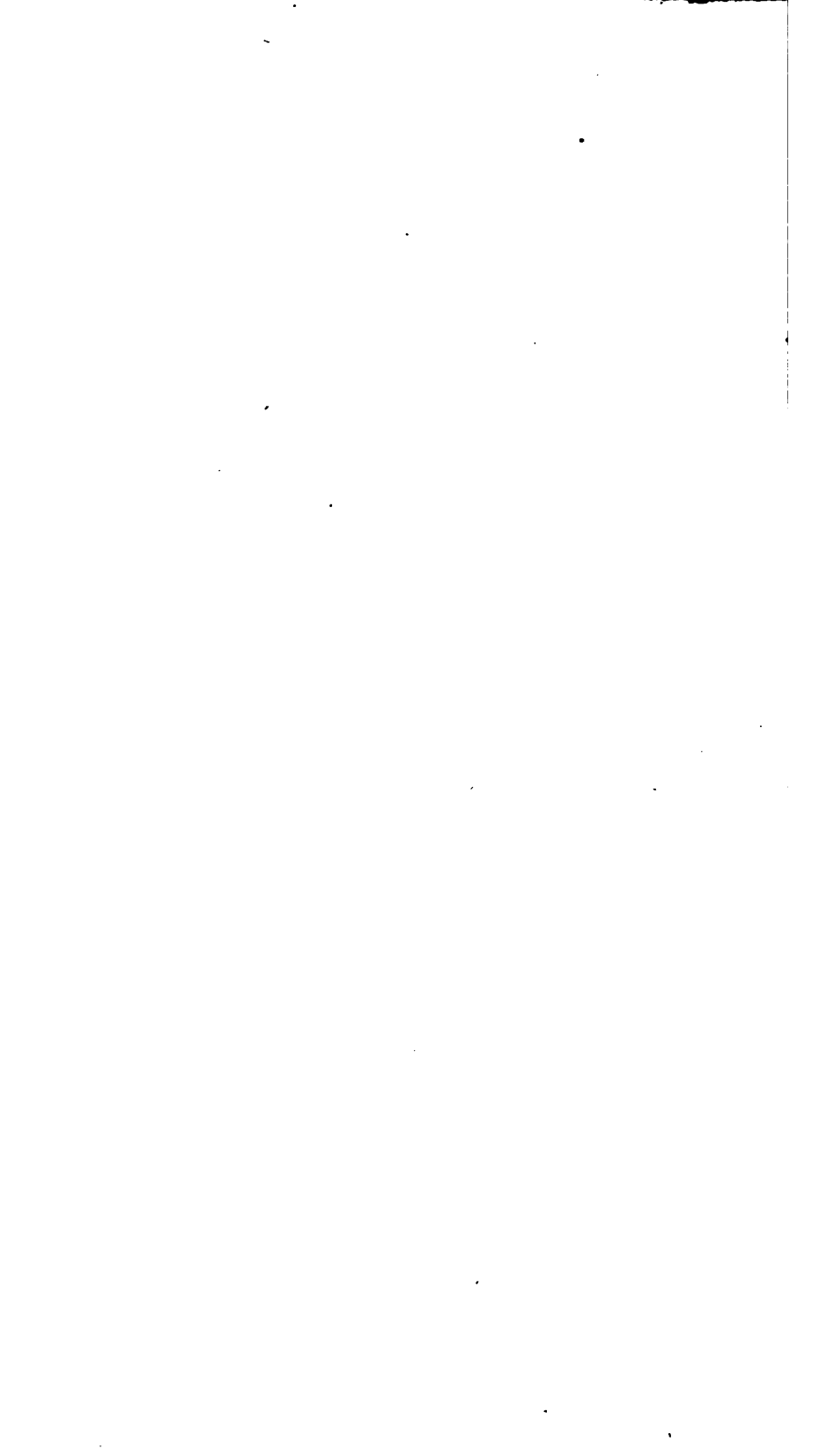














**THE**  
**AMERICAN DECISIONS**

**CONTAINING ALL THE**

**CASES OF GENERAL VALUE AND AUTHORITY**

**DECIDED IN**

**THE COURTS OF THE SEVERAL STATES**

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO  
THE YEAR 1860.**

**COMPILED AND ANNOTATED BY**

**JOHN PROFFATT, LL. B.,**

*Author of "A Treatise on Jury Trial," etc.*

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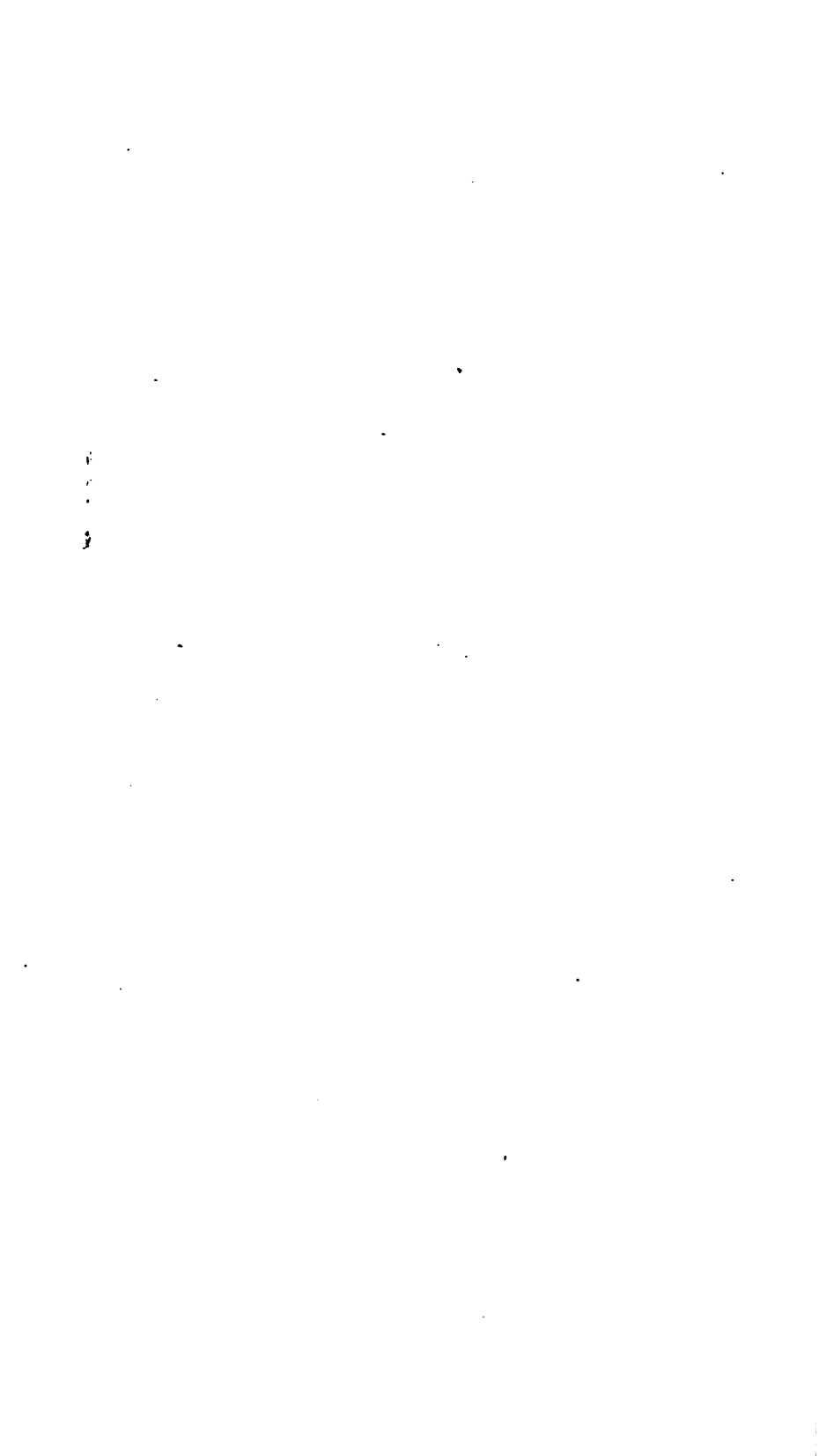
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**AMERICAN DECISIONS.**  
**VOL. X.**



CASES.  
IN THE  
SUPREME COURT  
OF  
MAINE.

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FOSDICK v. GOODING.

[1 FEBRUARY, 20.]

**DOWER IN SEPARATE TRACTS.**—Where the husband conveys to two in severalty and dies thereafter, the widow should have dower assigned out of each distinct parcel of the land; and likewise if he conveys to one, and the latter convey in separate parcels to several.

**JOINDER IN ACTION—PLEADING.**—Tenants in severalty of distinct parcels of land cannot be joined in a writ of dower. In dower, several tenancy must be pleaded in abatement; non-tenure may be also pleaded in bar.

**DOWER unde nihil habet**, wherein the plaintiff demanded against the defendants her third part of a certain messuage or tract of land, by right of a seisin of her late husband. It was agreed that the husband was seised in fee of the premises in his life-time, and during the time of the marriage; that the United States, before his death, levied on the same, on a judgment obtained against the husband; that the United States afterwards sold and conveyed the same in fee to Caleb Graffam, deceased, late husband of Anne, one of the tenants; that said Anne, after the death of her husband, and before the decease of the demandant's husband, had one third part of the premises set off to her in dower; that Gooding, the defendant, purchased the whole estate of Caleb Graffam, including the reversion of dower, and was in the actual occupation of the other two thirds of the premises; and in this way Gooding and Anne Graffam were tenants at the time action was brought. Anne Graffam suffered a default. No plea in abatement was put in by Gooding; and the question now submitted was, whether the demandant is now entitled to maintain her action against the tenant, Gooding, jointly with the said Anne.

*Davies*, for demandant.

*Whitman*, for tenant.

By Court, MELLETT, C. J.\* At the hearing of this cause we listened with much pleasure to the learned and able discussion of its merits; and having since examined most of the authorities to which we have been referred, we have at length arrived at what we believe to be a correct and legal conclusion. In the argument two questions have been presented for our consideration: 1. Was the action rightly commenced against the two tenants jointly? 2. If not, can the tenant Gooding, the other tenant being defaulted, now object to this joinder, and thereby defeat the action, no other plea in abatement having been put in?

The statement of facts shows the respective character and rights of the two tenants, their relation to the demandant, and to each other. At the commencement of this action, they were tenants of the freehold in severalty of distinct parcels of the premises whereof dower was demanded. Numerous authorities were cited and arguments urged to prove that the seisin of the dowress is, in consideration of law, a continuation of the seisin of the husband, as to priority of right of dower and the mode of assignment. We deem this principle of law to be well settled, subject to certain limitations hereafter mentioned; and we shall not dwell on this part of the case, but proceed to the examination of some others, involved in a degree of doubt and uncertainty.

As a consequence flowing from the principle just stated, the counsel for the demandant contends that the original seisin of the husband entirely overreaches and defeats every kind of subsequent seisin that may be acquired after his alienation or death. Our statutes provide two modes by which a widow may obtain the assignment of her dower; and one or the other of these modes is to be adopted, according to circumstances. In those cases in which the husband dies seised, provision is made for the assignment of dower by the judge of probate; and in such cases this course is almost universally pursued. It is a subject peculiarly appertaining to the jurisdiction of the probate court; and in the case of *Sheafe v. O'Neil*, 9 Mass. 9, it is considered as the correct mode of proceeding. But the power of the judge is confined to those cases in which the husband dies seised. If in his life-time he had parted with the estate,

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\* The court at this time consisted of the chief justice, Preble and Weston, JJ.

and the assignee holds and owns it, the jurisdiction of the probate court does not extend to it. In such cases, and such only, it is necessary to institute a suit at common law; perhaps we may say that in such cases only can it be proper so to do.

It seems to be admitted that the husband, in his life-time, may by his conveyance, in some degree impair the widow's right of dower, though he cannot defeat it; that is to say, if he should die, not having alienated any portion of his estate, his widow could legally be endowed in *solido*; but if he should convey his estate to four different persons, one distinct parcel to each, and die, the widow must demand and receive dower of the four different grantees, in four different parcels; and this may essentially impair the value of her dower, though not in any degree lessen the proportion. The case of *Porter v. Wheeler*, 13 Mass. 504, seems to adopt and proceed upon this principle. It recognizes the power of the husband to affect the widow's rights to a certain extent by his act of conveyance, and impair them by qualifying the mode of her enjoyment of them.

The case of *Porter v. Wheeler* goes no further than to declare the effect of a sale and conveyance by the husband of a part of the estate to one person, he continuing to own the residue; and this is supposed to be essentially different from the case where the husband conveys the whole estate to one man, and this grantee afterwards, and in the life-time of the husband, makes a division of the estate, by selling it to two persons, in two distinct parts. According to the argument of the demandant's counsel, the widow, in this latter case, might demand her dower against these two after-purchasers jointly. The question is deserving of consideration, whether there be any legal distinction in the two cases. Where the husband conveys the estate to two or more in severalty, the act is admitted to bind the wife, to a certain extent; and the reason is because it is his act, by virtue of which the partition is effected. Now is it not his act, which causes the partition in the other case stated. If the husband sells his estate to A. and B. in equal parts in severalty, he then directly makes the division; if he sells the whole estate to C. who sells it to A. and B. in equal parts in severalty, then the husband makes the division indirectly; and it would seem that when this second conveyance is made by C. to A. and B. in the life-time of the husband, the consequences as to the widow, in respect of dower, would be the same. In the one case, the husband divides the estate himself and by his own deed; in the other, he sells the whole estate, and parts

with all control over it; and thereby expressly authorizes his grantee to divide the estate into as many parcels as he may think proper.

The facts in the case of *Porter v. Wheeler*, and other cases bearing on this point, did not require an examination of the principle of law as to the operation of the husband's deed except where he made the partition by his own immediate act; but we apprehend the same principle must be applied in the case where the partition of the estate is made by an assignee of the husband, before the widow comes forward to demand her dower. In both cases it is the act of the husband, mediate or immediate, which creates the severance of the estate, and to the extent before mentioned, qualifies the rights of the widow.

The next inquiry is, whether the principle which we have been examining is applicable to the case before us. It does not appear that Fosdick, the husband of the demandant, ever did in his life-time alienate the estate in question by any legal act or instrument; but still he did not die seised of it, because the United States extended their execution upon it to satisfy a judgment they had obtained against him for a debt which he owed them. He did not redeem the estate within the time by law allowed for its redemption, whereby it vested absolutely in the United States. This is a statute purchase of the estate, differing from a common purchase only in this, that the price was determined by indifferent judges, and the transfer of the fee was not purely voluntary; but the effect of the extent was to pass all Fosdick's title and estate in the premises, and his deed could have done no more. Why should any legal distinction exist between the two cases, in relation to the widow's dower? If the husband can, to a certain extent, impair her dower, as to the mode of enjoying it, by a conveyance by his deed, why should not a conveyance by extent have the same effect, it being made to satisfy a judgment, and thereby to discharge a debt which the husband had an unquestionable right to contract. In regard to the point under consideration, what difference can there be between a husband's contracting a debt of one thousand dollars, and paying it by a piece of real estate which he conveys to his creditor by deed, and his suffering himself to be sued for the debt, and the same land to be taken by execution in satisfaction of the debt? If then, the extent be similar in its effects, to a deed from Fosdick to the United States, the question will not be varied by the subsequent conveyances from the United States to Paine, and from Paine to



Graffam; as these owed their origin to Fosdick's acts, in contracting a debt to the United States.

Thus by the act of Fosdick, the estate in question was once the property of Graffam, whereby Anne Graffam, his widow, became entitled to her dower, and her husband dying before Fosdick, that dower has been assigned to her, in virtue of which assignment she now claims and possesses a portion of the premises described in the writ, and Gooding, as purchaser, claims and possesses the residue, including the reversion. Each of the defendants is tenant in severalty of a sufficient estate, one owning and possessing a freehold, and the other a fee-simple. If this reasoning be correct, it seems to follow conclusively that the tenants were improperly joined in this action.

But we proceed to examine the cause on other grounds, and independently of the analogies above suggested. It does not appear in more than one or two of the ancient cases cited, whether the defendants, who were joined in an action of dower, were several or joint occupants and tenants of the freehold; as in the cases cited from Rastell, 235, Dower; Viner, Dower, M. a. 2; 7 Hen. VI., 33, 34. The case from Fitzherbert, relied on by the counsel, is open to the same remark. The terms "several tenants" do in no wise imply, in all cases; that they were tenants in severalty, of distinct parcels. The word "several" is often used numerically. The same remark as to uncertainty is admitted by the plaintiff's counsel to be applicable to the case from 3 Ld. Raym. 151. The case cited from Viner, 275, Dower, L. a. 9, is equally uncertain as to the nature of the tenancy, whether joint or several. Neither can anything certain be inferred from the passage cited from the note in 3 Chit. Pl. 593. The words are: "The action of dower should be brought against all the tenants of the freehold." Does this mean several tenants? Certainly not.

With this uncertainty before us as to the precise nature of the facts in many of the old cases, it may afford us light to look into books of more modern date. The learning and indefatigable research of Chitty entitle him to much respect as a special pleader. In his third volume, 601, we are furnished with the pleas in an action of dower against two persons. They were submitted to the examination of Mr. Warren, who gave the following opinion: "As there is in this case a separate tenancy, there ought to be separate actions, and the defendants having severally pleaded non-tenancy, I think the actions ought to be discontinued and new ones brought against each respective tenant."

The "non-tenancy" which each one pleaded must have been as to part only of the premises, otherwise a new action would not have been commenced against each. This last cited passage seems to explain the other, above quoted from the same volume.

Booth, in many places, speaks of the similarity of the pleadings in actions of dower to those in other real actions. Some years since it was usual in writs of entry, to declare against a number of disseizors in one writ, although they were in possession of different parcels of the demanded premises, and each claiming independently of the others. Many causes commenced in this manner were finally decided, but in an action pending when the late Chief Justice Parsons came upon the bench, he corrected the practice, and by consent of parties all the tenants but one were struck out of the writ. Since that time it has uniformly been the course of proceedings to commence actions against each tenant who claimed and occupied in severalty. The principle is clearly stated in *Varnum v. Abbot*, 12 Mass. 480 [7 Am. Dec. 87]. In this manner the confusion arising from the trial of distinct and different rights in the same action has been avoided, and legal principles and forms of proceeding have been restored. The same convenience results from adopting similar principles in actions of dower. If separate tenants are joined in actions of dower, questions distinct and independent in their nature may require decision. One may plead a release of dower as to the premises he holds in severalty; another may plead that there has been no demand ever made by the plaintiff, in fact there may be as many distinct trials as there are parties. Nothing but consent on the part of the defendants can render such a mode of proceeding admissible.

But it is contended that Gooding being the owner of the reversion, stands in the place of the heirs of Graffam; that there is therefore such a privity between the defendants that he ought to be joined in the action with Anne Graffam, the widow and tenant in dower; because he would be liable to voucher to save his estate, and that by such joinder the delay of vouching would be avoided. But this delay cannot be the ground of any argument, and perhaps, according to our practice, no such voucher would be necessary or proper. The proceedings in our courts respecting voucher to warrant are essentially variant from those in use in England, either formerly or at the present day, and we cannot reason from these with accuracy or safety. With us, the warrantor of the tenant may be vouched; but yet

he is never joined in the action originally, and he need not come into court after he is vouched. The object in view, and the advantage in vouching him is, that the record of the proceedings and judgment in the action against the tenant may become legal evidence in an action to be brought by the tenant against the warrantor or his representatives on his covenants. We therefore do not particularly notice the numerous authorities on this head cited by the demandant's counsel, as we consider the application of them to this cause as at least very doubtful. Besides, it should be remembered that Gooding owns a part of the estate in fee-simple, exclusive of the reversion, to which the foregoing objection cannot apply.

But if the cases cited from the early year books did show explicitly that several tenants holding distinct parcels in severalty of the lands whereof dower was claimed were joined in one action, still there exists an argument with us against such joinder, which did not exist at that time in England. Before the statute of Merton, 20 Hen. III., ch. 1, no damages were recoverable in actions of dower, even against the heir, in those cases where the husband died seised, and against the assignee of the husband that statute gave no action. But by our laws, damages may be recovered after demand, in all cases against the person having the legal estate; as is settled in the case of *Parker v. Murphy*, 12 Mass. 485. If, then, a joint action of dower can be maintained against several persons claiming and holding distinct parcels, the consequence will be the assessment of joint damages, in cases perhaps where some of the defendants may be unable to pay their proportion; and of course those who are of ability must pay the whole, and seek their remedy against one or more co-defendants unable to reimburse them. Besides, it may appear on trial that much larger damages ought to be recovered against some of the defendants than against others.

There is another argument deserving consideration which tends very plainly to show the impolicy, if not injustice of allowing a joint action of dower to be maintained against several persons holding in severalty parcels of the estate formerly belonging to the husband, whether they hold as immediate grantees under him, or as assignees of such grantees, and strengthens the argument in favor of the principle we would establish. If the husband in his life-time sold the estate to A. B. and C. in distinct parcels, without warranty, each purchaser would estimate the loss which he might sustain should the wife of the grantor survive him and demand her dower. Or if the

husband sold with warranty to each, he could estimate very nearly the sum in damages which each grantee could recover of his representatives if the wife should survive and demand her dower. Now in the case stated, it is admitted that several actions of dower must be brought. Suppose the husband sold the whole estate to A., and he sold it in three distinct parcels to B. C. and D. If A. gave no warranty to either of these purchasers, the price given by each would be regulated in some degree by the liability to dower, and consequent reduction of value. This diminution could be estimated by each purchaser, and thus he would make his contract with understanding and fairness. But if the principle contended for by the plaintiff's counsel be correct, a joint action might be maintained against B. C. and D., and the dower be so assigned as to swallow up the whole tract conveyed to B., who would thus be left destitute of any remedy, and actually suffer a loss three times greater than he anticipated or had any reason to expect. And if A. sold to each with warranty, still B. might be placed in the same situation, should his warrantor prove unable to indemnify him on his covenant. It is true the chance of future insolvency must always be taken by the purchaser in cases of warranty; but this is no good reason why a principle of law should be adopted or sanctioned, by which such purchaser should be compelled to incur the hazard of losing three times the amount which was contemplated, either by him or his grantor. The inconvenience and injustice in the case last supposed, of a division of the estate by the grantee of the husband, are equally as great as in the case where the husband himself makes the division by his own deeds; and it does not readily occur to us what sounder reason there can be why the same legal principles should not be applied to both; or why, in either case, an action of dower should, in this State, be maintained against grantees jointly. We cannot perceive any justice or reason in requiring a course of proceedings leading to such results, introducing inconveniences and perplexities, and often producing losses and damage which cannot be repaired.

We do not consider our statute as in any manner altering the common law with respect to the mode of declaring in actions of dower, by using the plural expression "persons," in describing those against whom the action may be brought. The words of the statute may be satisfied by supposing them to mean all persons claiming right or inheritance in the estate jointly. But we need not resort to such arguments, because this kind of language is common in statutes where a joinder of different offend-

ers, debtors or delinquents in the same indictment or action was never contemplated by the legislature. Under this head we will mention one argument more, which does not seem to admit of an answer.

According to all authorities upon this subject, it is perfectly clear that in real action, and among others, in actions of dower, several tenancy may be pleaded in abatement, and that it is a good plea. This principle seems to be as clearly laid down as the principle that in actions of *assumpsit* the omission to join all the joint promisors as defendants may be pleaded in abatement, and that such plea is good. The authorities as to the plea in abatement of several tenancy will be noted under the next head. They establish the principle that in actions of dower several persons, claiming, holding and owning distinct parcels of the estate whereof dower is demanded cannot legally be joined as defendants in the same action. The books show, with equal clearness, that in actions of *assumpsit* all the joint promisors must be joined. A joint action in the one case, and an action not embracing all the joint promisors in the other, cannot be maintained, unless in the real action the exception to the joinder, and in the personal action to the non-joinder, has been waived, either expressly or by implication. This leads us to the consideration of the second question presented by the case.

2. Can the tenant Gooding now object to the joinder of the two tenants in this action, no plea in abatement having been filed in the case; or in other words, must several tenancy be pleaded in abatement?

In England, non-tenure is pleadable in abatement only Booth, 28; Comyn's Dig. Abatement, F. 14. The same principle was recognized in Massachusetts in the case of *Keith v. Swan*, 11 Mass. 216. Afterwards in the case of *Prescott v. Hutchinson*, 13 Mass. 445, it was decided that a disclaimer was good as a plea in bar, having long been used as such; and in *Otis v. Warren*, 14 Id. 229, it was decided that non-tenure might also be pleaded in bar. If, therefore, the present action had been commenced against Gooding only, and he had pleaded in bar non-tenure as to all or a part of the premises described, such plea would have been good here, though not in England. As to the plea of several tenancy, it does not appear, by any decisions in Massachusetts, to have changed its original character. In the English books of authority it is always considered as a plea in abatement: Booth, 34; Rast. Ent. 365, a; 6 Jacobs' Diet. 68; Comyn's Dig. tit. Abatement, F. 12. "If an action

be sued against several, it may be pleaded in abatement that they hold severally." "So in *mort d'ancestor*, several tenancy is a good plea." "So in dower." See, also, 8 Chitty, 601, 602. Though it is said in the books quoted that several tenancy and non-tenure may be pleaded in abatement, the meaning is that they must be. They are classed among those things which may be pleaded in abatement, as distinguished from those which form another class, and are pleadable in bar. By omitting to plead his several tenancy, the tenant Gooding must be considered as having waived all objections to the form of the action, and he is now precluded from urging them on the trial of the merits. The authorities on this point are clear, and they settle the question in favor of the demandant.

We might have decided this last point alone, sparing ourselves the labor of examining the other and principal question. But as this was fully argued by the counsel, we concluded to give an opinion on that also; especially as it may be useful in regulating the practice in future actions of this nature.

## LINCOLN AND KENNEBEC BANK v. RICHARDSON.

[1 GREENLEAF, 79.]

**CHARTER A CONTRACT.**—A statute granting corporate powers is inoperative till it is accepted, but after acceptance, it becomes a contract.

**REVIVAL OF CORPORATION.**—After the expiration of the charter of a banking company, it may be revived in all its original force, by a subsequent statute, which will merely revive the former corporation, and will not create it anew.

**ASSUMPSIT** upon a note, known as a stock note. In a case stated, it was agreed that the Lincoln & Kennebeck Bank was incorporated twenty-third of June, 1802, to continue for ten years, from the first Monday of October, 1802; that by an act passed on the first of June, 1812, certain banks were continued with all their powers till the first Monday of October, 1816, and by a later act these banks were continued for a further period of three years. The material question is stated in the opinion.

*R. Williams*, for plaintiff.

*Longfellow and Ames*, for defendant.

By Court, **MELLEN**, C. J. This case comes before us on an agreed statement of facts, and was submitted without argument, on the ground that all the general reasoning in relation to the

subject, had been gone into in the case of *Foster v. The Essex Bank* [8 Am. Dec. 135], which cause has been recently decided by the supreme judicial court of Massachusetts, and we are now merely called upon to decide whether the difference between the two cases as to some of the facts will vary the principles of law by which the case must be determined.

There are only two points in which the cases differ. In the case before us a bank is plaintiff, in the other a bank was defendant, and in the present case the act of June 1, 1812, continued the powers of this and other banks until the first Monday of October, 1816; and the second act for continuing or reviving the powers of banks did not pass till December 14, 1816, more than two months after the first extending act had ceased to operate; whereas, in the other case, the extending act was passed some weeks before the expiration of the charter of the Essex Bank.

We have examined the opinion of the court in the latter case, and are perfectly satisfied with their reasoning and conclusion; and we are of opinion that the same principles ought to govern both cases. The chief justice in pronouncing the decision of the court in the action against the Essex Bank, observes: "We think it no objection that this additional term should be granted by an act made subsequent to the time when the charter was granted. A debtor to the bank could not object to a suit on the ground that the original term of the charter had expired, for the very bringing of the action would be an acceptance of the charter." We apprehend that the same principle of law applies to an act continuing a charter beyond its original term, as to the act which granted the charter; that is, in both cases the grant or chartered powers, must be accepted, because a charter, and the extension of it, are, till so accepted, inoperative, but when accepted, they become contracts. Nor do we perceive that, on this principle, it is of importance whether the extending act is passed before or after the expiration of the original charter. Acceptance is necessary in both cases.

By bringing the present action the plaintiffs have declared their acceptance of the new powers granted to them by the extending or reviving act of December 14th, 1816; and of course are liable to be sued by their creditors, as well as empowered to enforce payment by their debtors. It would be a harsh and unjust principle, which would compel them to pay their debts because they have accepted the new powers, and yet deny them the use of legal process to enable them to collect

the funds necessary for the purpose. If it should be urged, as it has been, that there is no assent on the part of the debtors of the bank to the extension of the charter, and that the bringing of this suit, though it may be proof of acceptance on the part of the bank, is not so on the part of Richardson; it may be replied, in addition to what has been before observed, that it appears by the agreement of the parties that the note in suit is a stock note, and of course Richardson is a stockholder. He is then bound by the act of acceptance on the part of the directors, the prosecution of this action. The stockholders are bound by their official acts, within the limits of their ordinary duties. Besides it is for the interest of the defendant, as one of the stockholders, that the debts due to the corporation should be faithfully collected and applied.

We all are of opinion that the action is maintainable, and according to the agreement of the parties the defendant must be defaulted.

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### BETHUM v. TURNER.

[1 GREENLEAF, 111.]

**PRESUMPTION OF GRANT FROM USAGE.**—A general usage, like that of depositing lumber on the banks of a river, accompanied by no claim of title, nor an intention to occupy the land in exclusion of the owner's rights, furnishes no presumption of a grant.

**TRESPASS.** General issue pleaded, with leave to give special matter in evidence. The material question was whether a certain usage by which the inhabitants had been accustomed to deposit lumber on the banks of a river, would justify a presumption of a grant. The opinion on this point is only given; the other point being merely of local interest.

*Allen*, for plaintiff.

*Bond*, for defendant.

By Court, MELLAN, C. J. As to the second ground of the motion, it is necessary to attend to some facts in the report of the judge respecting the ownership of the *locus in quo*, the former owners of it, and the situation of the adjoining lots. It appears that there is a highway leading to the river through and over the land in question; that there were no definite limits to the supposed public landing; that it was usual for any persons to deposit their lumber on the lot adjoining the plaintiffs for many rods on the bank of the river; that within one mile



of the disputed close there were four other places denominated public landings and used as such, and that until a few months before the commencement of the present action the *locus in quo* was owned by persons not inhabitants of this State. Under these circumstances the land now belonging to the plaintiff was used as a public landing; and this user is urged as the foundation of a legal presumption that the place in question had formerly been granted as a public landing.

Numerous cases have been cited by the counsel for the defendant to establish this position, and show that grants have been presumed after a user of little more than twenty years. With respect to these cases it may be remarked that they relate to claims of a private nature—of privileges or easements enjoyed by individuals—cases in which there was an exclusive enjoyment of the easement on the one side, and a knowledge of it and assent to it on the other.

In order to ascertain the nature of this kind of presumption we must look to the reason of it. It is founded on implied consent. Thus, if A. for a series of years permits B. to pass over his land, and makes no objection to it, it is presumed that this enjoyment is rightful; and if the user be continued a sufficient length of time, the legal presumption will be that A. granted the easement to B., after which A. shall not disturb B. in this enjoyment.

Generally speaking, the cases in the books relating to this subject cannot be safely applied to lands, a great portion of which has never been improved, where proprietors reside at a distance; where settlements are made on small portions of large lots, without the knowledge of the owners, or any claim of title on the part of the settler; or where the usages of the country are such as to collect people near the margin of a river, for the more easy transportation or more ready sale of their lumber; and where the persons thus resorting have no intention to appropriate the banks of the river to any other than a temporary use, on account of the facilities thus furnished.

In England, where the decisions alluded to were made, the lands generally are under improvement, under the inspection of some landlord or his agent, where any incroachments on the land, or improper appropriation of it must be known. There, if undue indulgence is shown and these encroachments acquiesced in, there is room for presumption of consent, or of a grant, to be allowed against those who will not guard their estates and protect them from legal conclusions affecting their rights.

But the manner in which the shore of the river, in the present case, has been used shows the intention of those who have used it for the purposes which have been mentioned. Several landings of the same kind being thus used we cannot consider the user as any claim of right, or as intended to prejudice the rights of the true owner. For as a man ought not to be considered as disseised until he has the means of knowing that a person has unlawfully entered into his lands and claims to hold them adversely, so no man can be considered as a disseisor, unless by election, whose possession was not really adversary. And for the same reason, a usage like that of depositing lumber on the banks of a river, when the usage is general and not accompanied by the claim of title, or an intention of appropriating the soil to the exclusion of the owner's rights, cannot furnish any legal ground for the presumption of a grant.

It has been urged that the plaintiff cannot maintain this action, not being in possession. But it is clear that the plaintiff has never been disseised by any of the acts stated in the report. To constitute such a disseisin the land must have been inclosed by a fence by persons claiming to hold the land adversely to the owner.

On the whole we are all satisfied that, for the reasons which have been stated, the action is well maintained, and that there must be judgment on the verdict.

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### RICKER v. KELLY.

[1 GREENLEAF, 117.]

**RIGHT UNDER PAROL LICENSE.**—Where the owner of land, for a valuable consideration, gives a parol license to another to build a bridge on the land, an action of trespass will lie against him for removing the bridge without the consent of the party who erected it.

**PART EXECUTION UNDER PAROL AGREEMENT.**—When any acts are done under a parol agreement for a right of way, or other interest in land, which are prejudicial to the party performing them, and are in part execution of such agreement, it is valid, and not within the statute of frauds.

**TRESPASS** for cutting down and destroying part of a wooden bridge, the property of the plaintiffs. The defendants pleaded that the bridge was erected on the land of the defendants. The plaintiffs, in reply, set up a license by parol to build the said bridge, as a consideration for certain work and labor performed. There was a demurrer to this replication.

*Rice*, in support of demurrer, cited *Cook v. Stearns*, 11 Mass. 533; *Pomfret v. Bicroft*, 1 Saund. 321, to the point that if they claim an interest, they should show how they acquired it, and a license in writing was necessary.

*Boutelle*, for plaintiffs, cited *Wells v. Banister*, 4 Mass. 514; *Taylor v. Townsend*, 8 Id. 411 [5 Am. Dec. 107]; *Davenport v. Mason*, 15 Mass. 92.

MELLEN, C. J. It appears by the pleadings in this case that the *locus in quo* belongs to the defendants; that sometime before the trespass, they had, for a valuable consideration paid to them, licensed the plaintiffs, by parol, to enter into said close and erect the part of the bridge which the defendants removed. It does not appear that this license was ever revoked, if revocable, nor that any notice was given to the plaintiffs to remove the bridge, prior to the removal of it by the defendants. Under these circumstances, is the action maintainable?

The justice of the plaintiffs' claim for indemnity is very apparent. But it is contended that no rights were conveyed to the plaintiffs by the license of the defendants, because it was not in writing; that it is nothing more than a lease at will, according to the statute of conveyancing: Stat. 1783, c. 37. To this it may be replied that a lease at will is good until the will is determined, and the lessee's rights remain until that time. This objection, therefore, cannot avail the defendants, because it does not appear that such lease was determined by the lessors before the removal of the bridge.

Again, it is contended by the defendants that as the plaintiffs claim an interest in the close, within the meaning of the statute of frauds, and the proof of this interest not being in writing, the permission of the defendants to the plaintiffs to enter upon the close and build said bridge, and enjoy a right of way over the close to the said bridge is void and ineffectual. In support of this objection, the counsel for the defendants has cited the case of *Cook v. Stearns*, 11 Mass. 533. We consider that case as materially different from the case at bar. In the case of *Cook v. Stearns*, the defendant claimed a permanent interest in the plaintiffs' close, and a right to maintain the bank, dam, etc., and at any time to enter on the land to make necessary repairs; and such a right the court decided could not pass without deed or writing. In the present case, the plaintiffs placed their own materials, in the form of part of a bridge, on the defendant's land by their express con-

sent, and if a right of way over the close to the bridge did not pass by parol, still the defendants had no right to seize and carry away the plaintiff's property and destroy its value. As well might the owner of a ship-yard permit another to build a ship in it, and when the ship was on the stocks, cut it in pieces and carry it away with impunity. Again, in *Cook v. Stearns*, the license relied upon by the defendant was never given by the plaintiff Cook, but by the former owners of the land, and it did not appear that Cook ever assented to and ratified such license, or ever knew of it. In the present case, the license was given by the very persons who have violated it to the prejudice of the plaintiffs. So far, at least, as regards the building of the bridge, the authority given by a license is good and sufficient, according to the decision in that case, and the authorities there cited. The license stated in the replication was to do a particular act; it was not intended to give a right to hold the defendants' land, to enter upon it at all times, and exercise dominion over it. Such an interest the statute requires should be passed by some writing. In *Cook v. Stearns*, the defendant claimed an easement without any deed or writing, and without prescription. Such a claim the law does not sanction. Not so in the present case.

But if the case before us should not be considered as presenting the question whether the defendant's permission is, in technical language, a license, and operating as such, still the counsel for the plaintiffs contends that it may operate as conveying a right to build the bridge, and a right of way, and is not within the statute of frauds, inasmuch as the contract set forth in the replication was executed on both parts, the consideration was received and the bridge was built. In support of this principle the cases of *Davenport v. Mason* and *Winter v. Brockwell* have been cited, and they support the principle advanced. In fact there are numerous decisions establishing the distinction between agreements executory and agreements executed in whole or in part. The statute of frauds is applicable to the former but not to the latter.

We are all of opinion that the replication is good and sufficient, and that there must be judgment for the plaintiff.

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NATURE OF LICENSE. — A license is in the nature of a power or authority conferred on another, with the quality of being revocable at the pleasure of the person conferring it. Chancellor Kent thus distinguishes it from an easement: "A claim for an easement must be founded upon grant, or by deed, or writing, or upon prescription which pre-supposes one, for it is a permanent interest in

another's land, with a right at all times to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts, upon another's land without possessing an estate therein. It is founded in personal confidence and is not assignable:" 3 Com. 452. It is essentially revocable, and its continuance depends on the will of the person by whom it is created: *Bartlett v. Prescott*, 41 N. H. 493; *Chynoweth v. Tennery*, 10 Wis. 397; *Desloge v. Pearce*, 28 Mo. 588; *Tanner v. Valentine*, 75 Ill. 624; *Hill v. Hill*, 113 Mass. 103; *Hickens v. Shaller*, 32 Mich. 496; *Johnson v. Carter*, 16 Mass. 443; *Mumford v. Whitney*, 15 Wend. 380; *Druse v. Wheeler*, 22 Mich. 439; *Houston v. Lafee*, 46 N. H. 505. It is therefore terminated at the death of the party conferring it: *Hunt v. Roumaniere*, 8 Wheat. 174; *Carter v. Page*, 4 Ired. 424; *DeHaro v. United States*, 5 Wall. 599.

Another element is, that it is personal; it is not capable of being assigned or transferred by the person to whom it is granted: *Emerson v. Fiske*, 6 Greenlf. 200; *Foot v. New Haven etc. R. R.*, 23 Conn. 214; *Harris v. Gillespie*, 6 N. H. 11; *Hill v. Cutting*, 113 Mass. 107; *Cowles v. Kendall*, 4 Foster, 364; *Jackson v. Babcock*, 4 Johns. 418; *Mendenhall v. Klinck*, 51 N. Y. 246. It is likewise personal as to the grantor: *Riddle v. Brown*, 20 Ala. 412; *Yeake v. Jacob*, 33 Pa. St. 376. So a conveyance of land will revoke every license and authority which had been previously given by the grantor: *Hays v. Richardson*, 1 Gill & J. 336; *Stevens v. Stevens*, 11 Met. 251; *Seidensparger v. Spear*, 17 Mo. 123; *Carter v. Harlan*, 6 Md. 29; *Prince v. Case*, 10 Conn. 375; *Vollmer's Appeal*, 61 Pa. St. 118; *Cowles v. Kidder*, 24 N. H. 379; *Blaisdell v. Portsmouth etc. R. R.*, 51 Id. 483; *Cobb v. Fisher*, 121 Mass. 169. These are the essential outlines of a license, but it may happen that certain rights may grow out of a license which may render it irrevocable, and which may either assimilate it to a contract or a power coupled with an interest, or more properly a grant. An estoppel may arise against a party conferring the license, so that he cannot be permitted to revoke it at pleasure. Thus a license may sometimes approach very near to a grant, because one mode of giving it is to authorize the donee to take: *Muskett v. Hill*, 5 Bing. N. C. 694; *Wickham v. Hawker*, 7 M. & W. 63, 76.

**WHEN NOT REVOCABLE.**—Whenever a power is coupled with an interest it cannot be recalled at the pleasure of the donor. So, a license when an interest is coupled therewith may lose the quality of revocability, and may then be transferred and assigned: *Watson v. King*, 4 Campb. 272; *Garrison v. Morton*, 10 B. & C. 731; *Travers v. Crane*, 15 Cal. 12; *Ferris v. Irving*, 28 Id. 645; *Boults v. Mitchell*, 3 Harris, (15 Pa. St.) 371; *Bourney v. Smith*, 17 Ill. 531; *Beattie v. Butler*, 21 Mo. 313; *United States v. Baltimore etc. R. R.*, 1 Hughes, 128; *Thompson v. McElarney*, 82 Pa. St. 174; *Miller v. State*, 39 Ind. 267; *Russell v. Hubbard*, 59 Ill. 335.

It is a material inquiry to determine when an interest thus arises, which will affect the revocability of a license. The interest is something collateral to a certain thing or right to which the license relates. All that is necessary to prevent the donor from revoking is that he should have conferred, or that the donee should possess some estate or interest which depends on the continuance of the license, and which cannot be enjoyed, if the license be withdrawn or terminated. Familiar cases where this principle is applied are in the sale or gift of a chattel which is situated on the land of the vendor or giver, and where game is killed, or timber felled on the faith of a permission from the owner. Here, as long as the right lasts, the license must accompany it, so that the right or interest may not be abrogated, or destroyed until the donee has had time to remove the property, or take possession: *Mumford v.*

*Whitney*, 15 Wend. 380; *Pierrepoint v. Barnard*, 5 Barb. 364; *Pense v. Gibson*, 6 Ma. 81; *Folsom v. Moore*, 19 Id. 252; *Harmon v. Harmon*, 61 Id. 222; *Long v. Buchanan*, 27 Md. 502; *Greeley v. Stillson*, 27 Mich. 153; *Boults v. Mitchell*, 15 Pa. St. 371; *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Owens v. Lewis*, 49 Ind. 489; *Drake v. Wells*, 11 Allen, 141. A license to enter a man's land, for the purpose of taking off corn, must be construed a license to enter by the usual mode of access provided for such purpose, as through the gate or other appropriate purpose: *Gardner v. Rowland*, 2 Ired. L. 247.

The interest one acquires under a license of this nature is well stated in an early English case: *Thomas v. Sorrel*, Vaugh, 330. In *Wood v. Leadbitter*, 13 M. & W. 844, Baron Alderson says: "A mere license is revocable, but that which is called a license, is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it, cannot in general, revoke it so as to defeat his grant, to which it was incident." See to the same effect: *Wood v. Manley*, 11 Ad. & E. 34; *Hewitt v. Johnson*, 7 Exch. 75. So a license to take stone implies a license to draw it carefully over the grantor's land: *Clark v. Vermont R. R.*, 28 Vt. 103.

This doctrine was applied in *Nettleton v. Sikes*, 8 Met. 34. An agreement had been made by which the defendant was to cut down and cord certain oak trees growing on the land of the plaintiff, and receive the bark in payment. After the trees had been cut down, and corded on the faith of this agreement, and the bark stripped off, the plaintiff prohibited the defendant from removing it, and brought trespass against him for disregarding the prohibition. The court held that although the license was essentially revocable when first given, it acquired a different character when executed, and could not be recalled to the injury of the licensee. So, in *Heath v. Randall*, 4 Cush. 5; *Hill v. Cutting*, 107 Mass. 596; *Ellis v. Clark*, 110 Id. 389; *Rynd v. Rynd Oil Co.*, 63 Pa. St. 397; *Rhodes v. Otis*, 33 Ala. 578; *Fuhr v. Dean*, 26 Mo. 116.

No permanent interest in the land of another, as an easement, can arise, or be created by means of a license; for this would, in effect, set aside the statute of frauds. When it is said that the license is irrevocable, it is meant that until a certain right or interest is secured, the interest continues, and the license is so far irrevocable: *Comb v. Burke*, 2 Hill, S. C. 534; *Desloge v. Pearce*, 38 Mo. 560; *Hetfield v. Central R. R.*, 5 Dutch. 571; *Clute v. Carr*, 20 Wis. 531; *Houston v. Laffee*, 46 N. H. 506; *Kamphouse v. Gaffner*, 73 Ill. 453; *Tanner v. Valentine*, 75 Id. 624; *Estes v. China*, 56 Ma. 407; *Owens v. Lewis*, 46 Ind. 489; see 3 Parsons on Contr. 34, and cases cited. But cases arise where on the faith of a parol license, certain interests are created in land, and improvements made, which equity will protect. Thus, although a parol license of a permanent easement on the land of another, as for instance, to back water thereon, is within the statute of frauds, yet if the licensee has made large investments for the enjoyment of such easement, equity will decree specific performance, as in cases of partly executed parol contracts of sale of lands: *Cook v. Pridgen*, 45 Ga. 331; *Parkhurst v. Van Cortland*, 14 Johns. 15 [7 Am. Dec. 427]; *Rerick v. Kern*, 14 Serg. & R. 267, included in Am. Leading Cases; *Veghte v. Raritan etc. Co.*, 4 C. E. Green, 142; 6 Id. 463; *Stiles v. Cowper*, 3 Atk. 602; *Carr v. Wallace*, 7 Watts, 396; *Hamilton v. Hamilton*, 4 Barr, 195; *Corbett v. Norcross*, 35 N. H. 99; *Watkins v. Peck*, 13 N. H. 361; *Stephens v. Benson*, 19 Ind. 367; *Taylor v. Ely*, 25 Conn. 250; *Cummins v. Webster*, 43 Ma. 192; *Foster v. Browning*, 4 R. I. 47; *Wynn v. Garland*, 19 Ark. 23; *Dark v. Johnston*, 55 Pa. St. 154; *Huff v. McCauley*, 53 Id. 206; *Jackson Co. v. Philadelphia etc. R. R.*, 11 Law Reg. 374; *Lane v. Miller*, 27 Ind. 534; *Hodgson v. Jeffries*, 52 Id. 334; *Evans*

v. *Lee*, 12 Nev. 393. In these cases, the principles of an equitable estoppel are applied, after one has acted on the faith of a parol license. It is on this ground that one cannot recall the license, where he allows another on its faith to erect buildings, dams, or improvements on his land. The license will then be co-extensive with the interest, and irrevocable as long as that endures. The principal case comes under this head, and its doctrine is affirmed by *Clement v. Durgin*, 5 Me. 9; *Androscoggin Bridge v. Bragg*, 11 N. H. 102; *Ocean Mfg. Co. v. Sprague Mfg. Co.*, 34 Conn. 524; *Wilson v. Chalfant*, 15 Ohio, 247. So in *Wood v. Hewitt*, 8 Q. B. 913, the plaintiff was held entitled to damages for the removal of a hatch or fender, which he had placed on the land of the defendant in pursuance of an authority for that purpose. The doctrine controlling all such cases is that no one can recall a promise or declaration made with a view of influencing the course of another after the latter has acted upon it, and thus place himself in a position where he must necessarily suffer if it be withdrawn: *Selden v. Delaware Canal Co.*, 29 N. Y. 634; *Osgood v. Howard*, 6 Greenl. 452; *Barnes v. Barnes*, 6 Vt. 338; *Merritt v. Horne*, 5 Ohio St. 307; *Le Fevre v. Le Fevre*, 8 Am. Dec. 696; *Lee v. McLeod*, 12 Nev. 280.

TRESPASS WILL NOT LIE where one goes on the land of another to remove buildings he has erected there under a parol license from the owner. This is a well-settled doctrine: *Doty v. Gorham*, 5 Pick. 487; *Ashmun v. Williams*, 8 Id. 402; *Fletcher v. Commercial Ins. Co.*, 18 Id. 417; *Russell v. Richards*, 10 Me. 429; *Bishop v. Babcock*, 22 Vt. 295; *Partridge v. First Church*, 39 Md. 631; *Owens v. Lewis*, 49 Ind. 489; *Pratt v. Ogden*, 34 N. Y. 20; *Richman v. Baldwin*, 1 Zab. 395; *Freeman v. Headley*, 4 Vroom, 524; *Selden v. Delaware Canal Co.*, 29 N. Y. 634; *Marston v. Gale*, 24 N. H. 176.

In *Davis v. Townsend*, 10 Barb. 333, a license to a tenant to remove buildings, which he had erected on the land during the term, was, in like manner, held to be a good defense to an action brought for the asportation, notwithstanding the objection that the realty was in question, and the case fell directly within the statute of frauds. In *Miller v. Syracuse etc. R. R.*, 6 Hill, 64, it was held that although a parol license to enter and raise an embankment on the plaintiff's land was essentially revocable, and might be cancelled after it had been executed; it was, notwithstanding, a justification for acts done while it was still in force, and that the plaintiff could not recover for the injury to his land without proving that the license was recalled, and that defendants went on with notice of the revocation. A similar decision was made in *Parsons v. Camp*, 11 Conn. 525, and a permission given orally that the grantor might enter and remove the manure which he had left on the land, was held to preclude the grantee from maintaining trespass for a subsequent entry in pursuance of the license and before it was revoked. The same ground was taken in *Smith v. Goulding*, 6 Cush. 154; *Riddle v. Brown*, 20 Ala. 412; *Johnson v. Lewis*, 13 Conn. 36; *Lowry v. Dutton*, 28 Ind. 473; *Blaisdell v. Portsmouth etc. R. R.*, 51 N. H. 483. If one enter upon the land of another by virtue of a parol license, given for a consideration paid, and erect fixtures, trespass will lie against the owner of the land for destroying them: *Wilson v. Chalfant*, 15 Ohio, 248.

It is held that a person who has a right of entry, by means of a license, to remove buildings or fixtures, cannot, when resisted, enforce his claim by a breach of the peace as by an assault and battery: *Churchill v. Hulbert*, 110 Mass. 42; *Sampson v. Henry*, 13 Pick. 379; *Commonwealth v. Haley*, 4 Allen, 318; *Hamilton v. Wendolf*, 36 Md. 301. In an action of trespass on real estate, a license cannot be proved under the general denial, it must be specially

pleaded: *Chase v. Long*, 44 Ind. 427; *Ruggles v. Lesure*, 24 Pick. 187; *Gronour v. Daniels*, 7 Blackf. 108; *Crabbe v. Fetrick*, Id. 373.

It therefore results that a license will be a full justification for the acts done under it, even when they consist in the exercise of an authority or privilege on the land.

**LICENSE AS RELATED TO ESTOPPEL.**—The doctrine of the law in regard to license, in many instances, blends and is related to the broader doctrine of estoppel *in pais*; and in the adjudications of the courts, the principles of the latter are more frequently applied, even when the decision is presumably on the ground of a license. Already, in the course of the examination of this subject, we have seen that the cases proceed largely on the doctrine of estoppel, when a license becomes irrevocable. Much confusion is therefore introduced; for the doctrine of estoppel is one of considerable uncertainty, every day expanding, and is not yet quite settled in its application. We have seen that rights may grow up under a parol license which equity will so far recognize and enforce that a specific performance may be decreed, and thus a grant or an easement may result by this mode of agreement. The difficulty in this case is to reconcile such cases with the decisions that hold that no easement or permanent right can be created by means of a license. Yet we find that such rights and easements have been created in this manner. It would be much less confusing, and give more certainty in the application of principles, if in these cases the doctrine of equitable estoppel was invoked, and the decisions placed on this ground, rather than upon an irrevocable license. For this reason, we will not in this place go into an examination of those numerous decisions, ostensibly based on parol licenses, but which, in reality, proceed on the ground of an equitable estoppel; and we will reserve an examination of this branch of the subject for a future note in these volumes when the doctrine of equitable estoppel is examined.

**LICENSE BY MEANS OF TICKETS, ETC.**—Familiar cases where the doctrine of license is applied, are those in regard to tickets of admission to theaters, race-courses, and public resorts, generally.

In the early English cases, the purchase of a season ticket from an agent was held to give an irrevocable right to enter and remain during the performance: *Taylor v. Waters*, 7 Taunt. 374. But this was overruled in *Wood v. Leadbitter*, 13 M. & W. 838. This was an action of trespass for an assault. The defendant pleaded that at the time of the supposed trespass the plaintiff was in the grounds of a certain lord, and the defendant, as his servant, and by his command, removed him. The facts showed that the servant's master was the steward at certain races; that tickets to the grand stand had been issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand and the inclosure round it during the races. The plaintiff bought one of these tickets, and was in the inclosure during the races. He was ordered to leave, on account of some former misconduct, and not doing so after a reasonable time elapsed, his money was returned, and he was ejected without unnecessary violence. This was held a justifiable act; and the jury were directed to find for the defendant. Baron Alderson held that the right which the ticket purported to give of entering on the race-course, and remaining there during the continuance of the races, was virtually an easement, which could not be granted without a deed; the license here was not sustained by an interest, and might consequently be revoked at any time.

This was followed in Massachusetts in *McCrea v. Marsh*, 12 Gray, 211, where it is held that a theater ticket is only a license to enter the part of the theater specified upon it; and if, before the holder has entered, the licenser,



with no more force than is necessary for the purpose, prevents him from entering, he cannot maintain an action of tort for the exclusion. The same court followed this decision in *Burton v. Scherpf*, 1 Allen, 133, in regard to the sale of a ticket for a concert, holding it to be a revocable license. Here it is held that although it may be revoked and the person ejected, he may have a remedy for a breach of contract.

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### ALDRICH v. ALBEE.

[1 GREENLEAF, 120.]

**DELIVERY OF SPECIFIC ARTICLES, PLACE OF.**—If no place of delivery is mentioned in a contract to deliver specific articles at a day certain, the creditor has the right to appoint the place.

**PLEADING TENDER OF SPECIFIC ARTICLES.**—A plea of tender of specific articles must state that they were kept ready until the uttermost convenient time of the day of payment.

**ASSUMPSIT** on a promissory note, payable in English hay, hemlock, bark, or good shingles. The defendants pleaded in bar, "that the plaintiff, at the time when said note was made and delivered, named and appointed the defendant's barn, in Malta, as the place for the delivery of the hay, and the public road between their house and Herriman's, in said Malta, as the place for the delivery of the bark; and that on the day when said note became due and payable they had in their said barn good English hay of a sufficient value to pay said note, and were ready at their said barn, in Malta, to deliver and pay to said Aldrich the sum mentioned in said note, with interest then due, in hay, according to the tenor and effect of said note; but neither the said Aldrich nor any other person for him were present to receive the same, and this," etc.

The plaintiff demurred to the plea on the ground that it was contradictory to the written contract; that the places of delivery mentioned were not alleged to have been agreed on by the parties; that it was not alleged that the articles ready for delivery at the uttermost convenient time of the day of payment, nor that the defendants ever gave notice which of the articles mentioned in the note they would deliver, nor at what place, nor that they ever requested the plaintiff to appoint the place; nor that any bark or shingles were ever ready at any place for delivery.

*Sprague*, for the plaintiff.

*R. Williams*, for the defendants.

MELLEN, C. J. In the decision of this cause we do not think it necessary to examine particularly all the causes of demurrer which have been assigned by the plaintiff, as we consider one of them as presenting a decisive objection to the plea in bar.

No place being specified in the promissory note declared upon, it was the right of the plaintiff to name the place for delivery of the articles promised: Co. Lit. 210; 3 Leon. 260. And he might appoint the place immediately after the note was signed, as well as at any other time, because such appointment and notice were for the benefit of the promisors.

Proof of this appointment, therefore, is no alteration of the contract, within the meaning of the cases cited upon this point by the counsel for the plaintiff. It is only the addition of a fact to enable the promisors more conveniently to perform the contract. We are inclined to the opinion that the plea is defective, as it contains no averments that the defendants, before the day appointed for payment of the note, gave notice to the plaintiff which of the articles mentioned they elected to deliver; but, because, as different places were appointed for the delivery of the articles, it would seem reasonable that the plaintiff should know in season at which of the appointed places he should attend to receive them. A case in Cro. El. 517, appears to support the principle, but the authorities relative to this point do not appear very clear or precise. We, therefore, do not give any express opinion on this cause of demurrer, nor profess to decide the cause upon it.

The principal and fatal defect in the plea is, that it does not appear that the defendants had the articles at the respective places appointed and ready to be delivered, at the uttermost convenient time of that day. On this point the authorities are numerous and decisive: *Duke of Rutland v. Hudson*, 1 Ld. Raym. 686; 2 Str. 777; *Wade's case*, 5 Rep. 115; 1 Plowd. 70; 3 Shep. Abr. 2, 3, 4, 5; 2 Chitty's Plead. 499.

The rule in pleading is this, the party must allege in his plea those facts which show that he has done all in his power to perform his contract. If on the day and at the place appointed, the debtor meet his creditor, at any hour of the day, he may tender the money or article which he promised, and if the creditor refuse it, he can do no more than keep the money ready, and bring it into court when sued. If the creditor do not attend at the time and place appointed, the debtor must still do all in his power to perform the contract; he must have the money or articles promised in readiness to be paid or de-

livered to the creditor; and if he do not appear, the debtor must remain there during the day in person or by agent, and to the uttermost convenient time of the day, that is, till after sunset, waiting for the creditor; and having done this, he can do no more except retain the money for the purposes before mentioned.

Such is the distinction between the cases where the creditor appears, and where he does not appear at the time and place appointed. And this distinction runs through all the cases on the subject. It is founded in plain common sense, and substantial justice, as the rules and principles of special pleading generally are. In the plea under consideration it is not stated that the articles promised were procured by the defendant, and kept ready at the time and places appointed, until the uttermost convenient time of the day of payment, and on this account the plea is defective. It may be that the defendant had the articles at the time and places at sunrise, and not afterwards, and still the plea would be true; but the plaintiff had the whole day to receive the articles in, and of course the defendant ought to have been ready the whole day to deliver them.

It is said that a different opinion is given by the court in the case of *Robbins v. Luce*, 4 Mass. 474. But upon examination it will be found that the two cases are not precisely similar. In that case, the demurrer to the plea in bar was general; here it is special. There the defendant averred that "always since giving the note, and particularly on the twentieth day of September (the day appointed) he had, and still has the barrels ready at his house, to deliver," etc. This averment amounts to a declaration that he had the barrels all the day appointed. It is important to notice the observation of the court. They say that if the defendant had gone on, and averred that the plaintiff was not there to receive them, the plea, if true, would be a good bar, and well pleaded. But they considered the want of that averment as a matter of form, and not being assigned as a cause of demurrer, they were inclined to sanction the plea as containing a substantial fact, viz: the possession of the barrels at the time and place appointed, and a readiness to deliver them; and this fact being admitted, was allowed as a bar to the action.

On the whole, we are all satisfied that, for the reasons stated, the plea in bar is insufficient.

## ULMER v. LELAND.

[1 GREENLEAF, 135.]

**PROBABLE CAUSE SUFFICIENT.**—The essential foundation of an action for malicious prosecution is the want of probable cause, and if such cause existed the action will not lie, however malicious the motives of the prosecutor may have been.

**PROBABLE CAUSE, HOW DETERMINED.**—The existence of probable cause is a mixed question of law and fact; the jury must find the facts relied on and the court will determine whether they constitute probable cause or not; and, in general, such conduct on the part of the accused as will warrant the inference that the prosecution was undertaken from public motives will be held to be probable cause.

**TRESPASS** on the case for a malicious prosecution. The facts were: The plaintiff, who was a colonel of volunteers in the war of 1812, was prosecuted before a military court of inquiry on charges preferred by the defendant and two other officers in the United States army, and was honorably acquitted. At the trial, the jury were instructed that even if the prosecution before the military court was undertaken through malice or revenge if there was probable cause for it, they should find for the defendant, and the question of probable cause was left to them to decide on all the evidence. There was a verdict for the plaintiff and a motion for a new trial on the ground of misdirection, and insufficient evidence to support the verdict.

*Leland*, for the motion.

*Abbot*, contra.

By Court, WESTON, J. Whether this action can be sustained for a prosecution of this kind, is a question not now presented to the consideration of the court.

The essential foundation of an action of this nature is, that a legal prosecution has been resorted to and pursued without probable cause. From the want of probable cause, malice is implied; but the former is not implied from the latter. If probable cause do exist, however malicious may have been the motive in which the prosecution originated, this action cannot be sustained.

Probable cause in general may be understood to be such conduct on the part of the accused, as may induce the court to infer that the prosecution was undertaken from public motives.

It is of importance that the rights of the citizen should be protected; but public policy also requires that prosecutions for offenses should not be discouraged. Hence there has been a

liberality of construction on the question of probable cause in favor of the prosecutor, wherever he could be fairly understood to have been influenced by a presumption of guilt on the part of the accused. Thus where an inferior tribunal, first regularly resorted to, has convicted, probable cause has been decided to have been sufficiently established, although a court of appellate jurisdiction has acquitted the accused, upon the most satisfactory demonstration of his innocence: 1 Wils. 232; 15 Mass. 243. And even where the evidence in support of the prosecution has been such as to induce the jury to pause, it has been ruled to be probable cause: *Smith v. McDonald*, 3 Esp. 7.

Whether probable cause exist or not is a question involving law and fact. Whether the circumstances relied on to prove its existence are true or not, is a matter of fact; but if found to be true, whether they amount to probable cause is a question of law: 1 T. R. 493.

The defendant moves for a new trial upon the ground that the jury were not properly instructed by the judge who presided at the trial as to the law of the case, and because the verdict is against evidence.

Upon the second point we give no opinion. From the report of the judge it appears that certain facts were proved, and that there was testimony in support of other facts; but there is nothing in the case from which it can be inferred that the latter were or were not found to be true. The facts being thus imperfectly exhibited, we have it not in our power to determine with precision the question of probable cause as applicable to this case; and upon this point, therefore, it is at this time neither necessary nor proper that we should intimate any opinion. It further appears from the report that the defendant insisted at the trial that the jury ought to be instructed, as a matter of law, that probable cause was fully made out. We have no doubt from the principles and authorities which govern cases of this kind, that it was the duty of the judge to have stated his opinion distinctly to the jury, whether probable cause was or was not established, if the evidence introduced by the defendant proved to their satisfaction the truth of the facts upon which he relied. It does not appear, however, that the judge gave any instructions to the jury upon the question of law involved in the case; but it does appear from his report that he left it to them to decide as a matter of evidence. This omission on the part of the judge is assigned by the defendant as the

principal ground upon which to support his motion for a new trial; and we are satisfied that for this reason the motion ought to prevail.

MELLEN, C. J., gave no opinion, having formerly been of counsel.

New trial granted.

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See note to *Bell v. Graham*, 9 Am. Dec. 687.

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## SEAWARD v. LORD.

[1 GREENLEAF, 163.]

**ACKNOWLEDGING DEBT BARRED.**—Where the maker of a note denied his signature, but said that if it could be proved that he signed it he would pay it, and his signature was proved, it was held that this was sufficient to take the case out of the statute of limitations.

**ASSUMPSIT** on a promissory note. Pleas, the general issue, and *non-assumpsit infra sex annos*. At the trial it was proved that when the note was presented to the defendant, some two years before, he denied that he had signed it, and pronounced it a forgery, but said that if it could be proved that he signed it he would pay it. Several witnesses testified that the signature was in the handwriting of the defendant, and that they had no doubt that it was his signature. The judge instructed the jury that if they believed from the evidence that the defendant signed the note, his subsequent promise took the case out of the statute of limitations. Verdict for the plaintiff, subject to the opinion of the whole court upon the correctness of the instructions.

*Emery*, for the defendant.

*Burleigh*, for the plaintiff.

By Court, MELLEN, C. J. By the report of the judge it appears that about two years before the commencement of the action, the defendant, in conversation with the plaintiff's agent, denied that he ever signed the note in question, and declared it forgery, but at the same time observed that if it could be proved that he signed it, he would pay it. The judge before whom the cause was tried instructed the jury, that if they believed from the evidence offered by the plaintiff, that the defendant did sign the note, then the promise which he made to the defendant was binding, and took the case out of the statute of limitations; and

we do not perceive any incorrectness in this opinion. When a promise is made on condition, if the condition be performed, the promise then becomes absolute, and surely an absolute promise made within six years would be sufficient. The case of *Heytings v. Hastings*, 1 Salk. 29, is in point: 1 Ld. Raym. 389; Carth. 470; 5 Mod. 425; S. C., cited in 3 Esp. 157, note, as a leading case.

It was said at the bar in the argument of this question, that the English courts are adopting more strict rules than they have heretofore admitted, as to the nature of the acknowledgment or promise which is considered sufficient to take a case out of the statute. But, however, the courts of a foreign country may judge it proper and prudent to narrow the principles which have been so long established and correct, we do not perceive any reason for changing the course of decisions here. The case cited from *Manle & Selwyn* is not so strong as the case at bar. In that case, the defendant indeed did admit the signature, but declared that the receipt was barred by the statute, was not worth anything, and that he never would pay the sum demanded. Surely this could not be considered as a new promise, or an acknowledgment, and the nonsuit was proper.

Judgment according to the verdict.

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See note to *Lord v. Shaler*, 8 Am. Dec. 160; and *Bell v. Rowland*, 3 Id. 722.

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## WARREN v. CRABTREE.

[1 GREENLEAF, 167.]

**RENEWAL OF USURIOUS CONTRACT.**—Where a note is given on a usurious contract, and partly paid, and a new note given for the balance, such new note is also usurious.

**DEFENSE OF USURY, TO WHOM AVAILABLE.**—Where a person, for the purpose of raising money, agrees with another to procure a note signed and indorsed by other parties, but not by himself, which the lender agrees to discount at usurious interest, and such note is accordingly obtained and discounted, an indorser thereon may resist payment on the ground of usury.

**ASSUMPSIT** by the indorsee against the indorser of a promissory note. Defense, usury. The facts were: One Hugh McLellan wished to borrow money from the plaintiff, agreed with him to procure a good note for five hundred dollars, payable in ninety days, which the plaintiff was to discount at one per cent. per month. McLellan accordingly procured a note signed by one

Mayo, payable to the defendant, or order, and indorsed by the latter, which the plaintiff discounted as agreed, the discount being the market value of the note, the said McLellan agreeing with Mayo and the defendant to pay the note at maturity. Before maturity, McLellan finding himself unable to pay the note, agreed with the plaintiff to pay two hundred dollars on it, and to procure another note from the same parties, payable in sixty days, which he did, and paid the same rate of discount as before. Being unable to pay the second note at maturity, McLellan agreed with the plaintiff to pay one hundred and fifty dollars, and to procure another note from the parties for the remainder, which he did, and the plaintiff discounted the new note at the same rate as before. This last was the note now in suit. McLellan did not indorse any of the notes, and it appeared that the plaintiff paid their fair market value for them. McLellan had secured Mayo and the defendant against their liability by giving them a note indorsed by another person. The judge, at the trial, directed a nonsuit, subject to the opinion of the whole court upon the case.

*Kinsman and Greenleaf*, for the plaintiff.

*Hopkins*, for the defendant.

By Court, MELLAN, C. J. The sum demanded in this action is part of a debt contracted in the year 1811. In examining the question presented in this case, it does not seem material whether the note in suit be considered as a substitute for a usurious note, and given to secure the balance due on the second note, or as being usurious in itself and in its origin, by reason of the verbal agreement to pay twelve per cent. interest. It is a principle well settled, that if the "original contract is usurious, any subsequent contract to carry it into effect is also usurious;" 3 T. R. 531; 15 Mass. 96; [*Bridge v. Hubbard*, 8 Am. Dec 86]; and if the substituted authority be given to the party to the original security, or his representatives, it is void, according to the doctrine of *Cuthbert v. Haley*, 8 T. R. 390.

The plaintiff opposes the defense on two grounds: 1. Because the plaintiff must be considered as having purchased the notes in the market at a fair discount, and under such circumstances that, according to the case of *Churchill v. Suter*, 4 Mass. 156, the contract cannot be deemed usurious; 2. Because the contract, if usurious, was not made by the defendant, and, of course, that he is not entitled by law to set up such defense.

With respect to the first objection, when we look at the evi-



dence in this case, we are not able to discover how the notes can be considered as having been purchased in the market by the plaintiff, so as to protect them from the statute. In cases of such purchase, the note is fairly made without previous concert, or any stipulations relating to the interest, and without reference to any one in particular as the intended purchaser. The note being signed and indorsed is offered for sale. Its value in the market must depend on the responsibility of the parties to it, the time of payment, and the scarcity of money; and the purchaser takes these particulars into consideration, and makes the purchase at what is supposed a fair discount. But in the present case, all was arranged beforehand. The loan was agreed upon, the rate of usurious interest settled between the plaintiff and McLellan, for whose use the loan was to be made, and the names of the promisor and indorser were known and accepted as good. Surely if such a mode of doing the business could change the whole transaction into a fair and innocent purchase of the note in the market, the law would be worse than useless, and such an evasion no honor to our courts of justice.

The plaintiff's second point is entitled to more respect, but we apprehend it does not in reality possess any more merit or solidity than the former. In the case of *Chadbourn v. Watts*, 10 Mass. 121 [6 Am. Dec. 100], the substituted security was given to Lancaster, and afterwards indorsed to Chadbourn, the plaintiff, who had no notice that usury had infected any of the preceding securities which had been given up, and in this respect it differs from the case at bar.

In *Cuthbert v. Haley*, before cited, Grose, J., expressly states that if the bond, which was the substituted security, had been given to Plank, who was the party to the original security and lender of the money on usurious interest, it would have been void; and the court proceeded on this principle. In *Young v. Wright*, 1 Camp. 139, the contract for usury was not made by the defendant, but between third parties; but Lord Ellenborough decided the defense to be good. According to the decision in the case of *Bridge v. Hubbard*, 15 Mass. 96 [8 Am. Dec. 86], cited at the bar, it is of no importance that the contract for the usury was made by McLellan with the plaintiff and the notes signed by others, he being no party to them; because it was known by all concerned that the loan was for his exclusive benefit, and the mode of securing the sum was agreed to by the plaintiff. It is true the court were divided in opin-

ion in that case; but the division was upon a question that does not seem to arise in the present case. Two of the court there considered the former contract, which all admitted to be usurious, as cancelled and extinguished by payment. In the case before us it expressly appears that the last note was given to secure the balance due on the second. But if this distinction did not exist, we might refer to the case of *Maddock v. Hammet*, 7 T. R. 184, to show that such substitution of securities does not amount to payment; and also to *Davis v. Maynard*, 9 Mass. 242, by which it appears that a new, and even higher security, given for a debt secured by a mortgage, does not discharge the mortgage.

If the note declared on be considered as unconnected with the preceding notes, the result must be the same; because at the time it was given, there was an express promise on the part of McLellan to pay twelve per cent. interest, and all was executed according to the wishes of the plaintiff, and by a preconcerted arrangement with him for the usury, and for the kind of security. If the principal and interest are secured by distinct notes, or the usury by a parol promise only, and all are executed at the same time, all are void; because such promise to pay interest constituted a part of the contract for the loan; and the statute declares the whole contract void. If such a device could protect the lender from the penalties of the statute, it would always be evaded with impunity.

We are therefore all of opinion that the motion to set aside the nonsuit must be overruled, and that there must be judgment for the defendant.

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See note to *Wylie v. Roosevelt*, 2 Am. Dec. 155.

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## GREELY v. BARTLETT.

[1 GREENLEAF, 172.]

**FACTOR SELLING ON CREDIT.**—Where a factor to whom goods are consigned for sale, generally sells them on credit to a merchant in good standing, taking a note payable to himself, and the purchaser becomes insolvent, the factor is not liable for the loss.

**ADVANCES BY FACTOR.**—Where a factor, in order to meet drafts drawn on him by his principal and accepted, sells the goods on credit, and takes a note payable to himself which he indorses and sells for money, and the maker's insolvency compels the factor to pay the note, he may recover the amount from his principal.

**ASSUMPT** by a factor against his principal to recover the balance of an account. The facts were: The defendant employed the plaintiff, who was a ship and merchandise broker, to sell his (the defendant's) interest in the ship *Jewel*. His instructions were: "Sell my part as you think proper. I hope you can sell the ship after loaded. If the accounts are all fairly settled, and her freight is good, and you can depend on the new captain, I shall not be so anxious, but still wish to get clear of her. Use your own judgment." On March 10, 1819, the plaintiff sold the defendant's share for one thousand dollars, to one Thurston, then a merchant in good standing, on six months' credit, and took Thurston's notes payable to himself or order. Before the sale the defendant drew on the plaintiff sundry bills of exchange, payable ninety days after sight, which were accepted by the plaintiff. When they became due the plaintiff having no funds to meet them and having in the meantime received Thurston's notes, indorsed and sold said notes for a fair price and took up the bills. On August 3, 1819, before the notes fell due, Thurston stopped payment and the plaintiff was compelled to take up the notes. It did not appear that the plaintiff was to derive, or did derive, any benefit from the transaction aside from his ordinary commissions on the sale. The first notice of the sale given by the plaintiff to the defendant, was in a letter dated April 3, 1819, wherein the price was stated at nine hundred and fifteen dollars, but the defendant did not learn that the sale was on credit, or who was the purchaser, until August 19, 1819, when the plaintiff wrote to him informing him of those facts and also of Thurston's failure, and requested him to make provision to meet the notes of Thurston which were then nearly due.

It appeared that an account was rendered by the plaintiff to the defendant May 11, 1819, crediting the latter with "one fourth part ship *Jewel*, nine hundred and fifteen dollars," which was the sum for which Thurston's notes were sold, less certain premiums and commissions for insurance; but the account made no mention of the discount or commissions. Other items in the same account were, however, stated in the same way, the discount being deducted without being mentioned. In the plaintiff's books the defendant was credited with the price of one fourth of the ship at one thousand dollars, and was charged with the discount, and at a subsequent date with the premiums for insurance. It further appeared that on Thurston's failure he assigned his property to certain persons,

of whom the plaintiff was one, who had gone on his bonds for custom dues, and had indorsed sundry notes for his accommodation, to secure them against their liability thereon; but in the assignment it was expressly stipulated that the assignees should take no benefit from it on account of any "business notes" due them, leaving them as to such notes on the same footing as the other creditors. The assignees realized from the assignment seventy-five per cent. of the amount for which they were responsible as friendly indorsers on sureties for Thurston. The plaintiff obtained a verdict for the amount of Thurston's notes with interest.

*Emery and Whitman*, for the defendant, claimed: 1. That the plaintiff, having voluntarily assumed the demand against Thurston as his own, the loss should fall upon him, citing: *Wallis v. Telfair*, in note to *Smith v. Lascelles*, 2 T. R. 188; *Tickell v. Short*, 2 Ves. 239; and, 2. That the plaintiff must bear the loss, also, because of culpable negligence in his duty as factor, in not advising the defendant promptly of the sale, etc., citing: *Jacobs' Law Dict. tit. Factor*; *Simpson v. Swan*, 3 Campb. 292; *Lewson v. Kirk*, Cro. Jac. 265; 1 Com. on Contracts, 234.

*Longfellow*, for the plaintiff.

By Court, MELLETT, C. J. The plaintiff, as the agent and factor of the defendant, having sold his part of the ship *Jewel* to Thurston on credit, and received his promissory note in payment; and having sold the note and indorsed it, to raise money to pay the defendant's drafts, and having been obliged to pay the amount to the indorsee, in consequence of the failure of Thurston before the note became due in this action, demands the sum thus paid, as money paid and advanced to the defendant's use. A verdict having been returned in favor of the plaintiff for that amount and interest, the defendant now moves that the verdict should be set aside and a new trial granted.

The claim of the plaintiff to reimbursement of the sum thus advanced is resisted by the defendant on two grounds: 1. Because the plaintiff has voluntarily assumed the debt which has been lost by the failure of Thurston, and made himself responsible; 2. If not, yet his conduct, as factor, has been such, and he has been guilty of such neglect in his agency with respect to the transaction, that the law renders him liable to sustain the loss himself. If either of these propositions be supported, the defendant's motion must prevail.

The relation subsisting between principal and factor is such

as necessarily to require great confidence on one part, and great care, attention and fidelity on the other. Without all these, it is impossible that the extensive concerns of the commercial part of the world can be managed with advantage, or even preserved from confusion. Hence the importance of continuing, in their full force, those legal principles which have been established for the protection of the rights of both parties, and of third persons who may be engaged with such factor in the transaction of commercial business.

Some of these general principles may be stated. By the law-merchant, a factor may sell the goods of his principal on a reasonable credit, unless he is restrained from so doing, either by his instructions or by the usage of the trade to which the transaction relates. A sale made under such circumstances is at the risk of the principal, and if a loss happens he must bear it. But he is not authorized to give credit, except to such persons as prudent people would trust with their own property. He may receive securities in his own name for goods sold without subjecting himself to liability merely by so doing. But he must deliver such securities to his principal, if he demand them, or in case of loss, he will be answerable as for a breach of trust, though in such case the principal should pay him his usual commissions.

If through carelessness, or want of proper examination and inquiry, he give credit to a man who is insolvent, should a loss happen, he must indemnify the principal. And if a debt be lost by the inattention of the factor in omitting to collect it when in his power to do so, he will be liable for it. He must be honest and faithful, and must give his principal all necessary or useful information respecting the concerns of his agency. Many of these principles are applicable to the case under consideration.

The first inquiry is, whether the plaintiff was authorized to sell the defendant's part of the vessel on credit. He was not forbidden by his instructions, nor is there any proof in the case tending to show any usage forbidding it. On the contrary, he had directions to sell the defendant's part "as he thought proper," and to "use his own judgment." Under this power the plaintiff was fully justified in selling on credit as he did; the fair value seems to have been obtained, and the credit of Thurston as the time of the sale being perfectly good, the plaintiff was warranted in receiving his personal security. Indeed, little or no objection is made to the plaintiff's conduct on this account.

But it is contended that as the plaintiff took the note from Thurston, payable to himself, and did not disclose to his principal the name of the purchaser nor the particular terms of the contract of sale for some months, he must be considered as the surety of Thurston, as guaranteeing the debt, and assuming on himself any eventual loss of it. But the manner in which the note was made payable can be of no importance in this instance. The cases cited by the plaintiff's counsel and the case of *Goode-now v. Tyler*, 7 Mass. 36 [5 Am. Dec. 22], are direct to this point.

With respect to the other branch of the objection, viz., the plaintiff's neglect to give early notice of the terms of the sale, and his giving no notice at all till after the failure of Thurston, no authority directly in support of this objection has been cited, except the case of *Simpson v. Swan*, 3 Campb. 292, which will presently be examined and compared with the case at bar. The commissions charged furnish no proof of guaranty, and we are well satisfied that if the defense be substantial, it must be on the ground of negligence on the part of the plaintiff. As the sale was made under sufficient authority to a merchant in good standing, on credit, and as the purchaser failed before the day of payment had arrived, it is not very easy to perceive how the omission to disclose the name of the purchaser before that day did or could prejudice the defendant, or why it should now prejudice the plaintiff. No imputation of fraud is even suggested. The case cited from 2 T. R. 128, of the neglect of a factor to make insurance, rests on principles different from those which apply to the case before us. In the case from Cro. Jac. 265, the agent exposed the goods of his principal to forfeiture by a direct violation of a public statute, as well as of his duty as a factor.

The case of *Simpson v. Swan* has been pressed upon us as a strong authority in favor of the defendant, and though it was only a *nisi prius* decision, yet it is entitled to respect from the character of the learned judge who pronounced it, and the acquiescence of the counsel in his opinion. But this case is in several particulars different from the case before us. Simpson, the factor, sold the leather consigned to him to a man notoriously insolvent at the time, and according to his usual practice, without naming the purchaser to his principal, he received a bill of exchange for the price, payable to himself, and then made and sent his own note to the defendant for the net proceeds. Lord Ellenborough said that the factor's remitting his

note to his principal for the proceeds naturally seemed to close the concern, and that it could not be unraveled without danger. The sale to an insolvent was also considered by the court a fatal objection to the action, as the loss had been occasioned by the gross negligence of the plaintiff himself. There was also a distinction taken by the same judge which is deserving of notice, as it seems to present a principle in aid of the present action. His words are: "If the principal draws before the sale, it is very reasonable that he should repay the money when the consideration fails on which the factor granted the acceptance. Then the principal is deprived of no information, and is led into no error."

Now in the case at bar it appears that in the month of November before the sale, the defendant drew bills on the plaintiff for upwards of one thousand dollars, which were accepted in December following, payable in March, a short time before the sale. This seems to be the precise case stated by Lord Ellenborough. For the purpose of raising money to pay these bills, the note of Thurston was sold, and indorsed by the plaintiff, and the payment of this note to the indorsee is the ground of the present claim of Greeley on the defendant. There is another fact appearing in the case which seems to show the defendant's recognition of the propriety of the sale of his share of the ship, and of the disposal of Thurston's note, and his approbation of the whole. We allude to his declaration when he was informed that the note had been negotiated at a discount of twelve per cent., that he would rather have given twenty per cent. than that his drafts on the plaintiffs should have been protested. This declaration must have been made after the receipt of Greeley's letter of August 19, and some time after the failure of Thurston.

It is contended that the information respecting the sale when given was not correct; that the plaintiff stated the sale to have been for nine hundred and fifteen dollars, whereas it was for a thousand. This, however, is explained by other facts. The commissions and discount on the note amounted to eighty-five dollars, so that the net proceeds were exactly nine hundred and fifteen dollars. This is only an inaccuracy in the method of stating the account. It was the conclusion instead of the premises from which that conclusion was drawn. There is also a small variance or disagreement in the charge of twenty-five dollars for premiums, etc., but this is explained by the fact that at the time of drawing out the account the premium had not been paid.

The last fact relied on by the defendant as proof of culpable neglect in the plaintiff, is the assignment of Thurston's effects to certain trustees, and the plaintiff's connection with that transaction. This assignment was made to secure seventy-five per cent. of the demands of several creditors, whose claims arose from suretyship for Thurston at the custom-house, or as friendly indorsers without consideration. It was not designed to embrace any debts arising in the ordinary course of business, and none such were embraced. The plaintiff, in this concern, guarded his own business debts no better than that of the defendant. Besides, the assignment was made of a vessel at sea, not in a situation to be attached by the plaintiff for the benefit of the defendant, and he could not have compelled Thurston to make the assignment in any other form.

On the whole, after a careful examination of the subject, we cannot discover any legal principles by which the plaintiff is bound to sustain the loss which has happened, or which forbid his reimbursement of the sum he has paid.

Judgment on the verdict.

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As to a factor selling on credit, see *Van Alen v. Vanderpool*, 5 Am. Dec. 192.

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## KENNEBEC PURCHASE v. TIFFANY.

[1 GREENLEAF, 219.]

**REFERENCE TO PLAN IN DEED.**—When a grant or deed refers to a certain plan, such plan becomes, by legal construction, a part of the deed, and is not explainable by extraneous evidence any further than it would be if actually inserted in the deed.

**PLAN GOVERNS ESTABLISHED LINES, WHEN.**—The proprietors of a tract of land had a map made of part of it, to be of a certain width, east and west, though the corners on the west side were not established, and afterwards had a survey made of another contiguous portion, when the surveyor marked out a line as the west boundary of the first survey, putting it further west than originally intended, it was held that purchasers of lots, included in the first plan and referring to such plan, must be governed by it, and could not take to the line thus established.

**WRIT of entry to recover possession of a certain parcel of land.** It was admitted that the demandants were the owners, unless the land in controversy was a part of a certain lot No. 72, purchased from the demandants in 1777, by one Levi Robinson, under whom the tenant claimed. It appeared that in 1761, the demandants employed one Nathan Winslow to survey and lay out three tiers of lots along the Kennebec river,



extending westward from the river three miles. Winslow accordingly surveyed the tract, and made a plan of it representing each lot as one mile in length east and west, and fifty rods wide. He established corners along the river, but did not actually run any lines or mark any corners west of the river. From subsequent measurement the width of many of the lots on the river was found to be fifty-four rods.

In 1768, the demandants employed one Dr. McKecknie to survey and lay out for Ebenezer Bacon, a lot of five hundred acres in the rear of the third tier of lots on Winslow's plan, three miles from the river, instructing him to keep clear of the lots on Winslow's plan. McKecknie measured from the river to find the west line of the third tier of lots and marked trees on the south-east and north-east corners of the lot surveyed for Bacon, which corners are now well known and lie in the rear of lots 75, 76, 78 and 79 on Winslow's plan, but by recent measurement appear to be three miles and seventy-two rods west of the river. The demandants granted the five hundred acres to Bacon according to McKecknie's plan describing the premises as a tract of land lying west of the river "at the rear of the settlers' back lots" etc., "butted and bounded as follows, to-wit: beginning at the west end of the north line of settlers' back lot No. 75," running thence certain courses and distances, and then "east south-east to the settlers' back lots, thence southerly on the settlers' back line" etc., to the place of beginning.

In 1774 the demandants employed one John Jones to lay out certain lots in the rear of the Winslow lots, beginning at the east end of the Bacon tract and extending southerly to the south end of Snow's pond, which was done and a plan was made by Jones representing the Bacon lot as the northern boundary, the pond as the western boundary, and a line drawn from the south-east corner of the Bacon lot southerly as the eastern boundary. At the request of the demandants Jones copied Winslow's plan upon his own, so that it would present at one view the whole tract between the pond and the river. Jones did not actually measure or mark out the western boundary of the lots on Winslow's plan.

The deed from the demandants to Robinson, the tenant's grantor, was for "lot No. 72 according to Nathan Winslow's plan," and Robinson claimed as far west as the east line of the Bacon tract, but did not make any improvements or inclosure within seventy-two rods of it.

The judge instructed the jury that Jones' plan was not to be regarded as evidence because the tenant claimed under the plan of Winslow; that the location of the Bacon tract being subsequent to the Winslow plan could not affect the construction of the deed to Robinson, the tenant's grantor; and that the tenant could not claim further west than three miles from the river. The demandants had a verdict subject to the opinion of the court on the correctness of these instructions.

*Bond*, for the tenant, cited *Jackson v. Ogden*, 4 Johns. 140; S. C., 7 Id. 238; *Jackson v. Murray*, Id. 5; *Jackson v. McCall*, 10 Id. 377 [6 Am. Dec. 343]; *Jackson v. Dieffendorf*, 3 Id. 269; *Jackson v. Vedder*, Id. 8; *Pernam v. Wead*, 6 Mass. 131; *Howe v. Bass*, 2 Id. 380 [3 Am. Dec. 59].

*R. Williams*, for the plaintiffs.

By Court, MELLETT, C. J. The motion for a new trial is grounded upon the rejections of certain proof offered by the tenant; and the particulars of this proof are stated in the report of the judge who presided in the trial. If this proof was improperly rejected, the verdict must be set aside and a new trial granted; otherwise the judgment must be entered for the demandants.

The demanded premises are claimed by the tenant as a part of lot 72, and in no other manner; and the question is, how far that lot extends westwardly. It is admitted that Winslow, when he made his plan of the first, second and third ranges, only measured the width of the lots on the first range and set up monuments by the river; and then made his plan of the three ranges; each to be one mile wide; or, in other words, the lot in each range were to be one mile in length; and that the extent of the lots in all the ranges was then to be ascertained by length of line only. The counsel for the tenant admits that the true west line of the third range is only three miles from Kennebeck river, unless it has been either expressly or by implications farther west, and so located by the proprietors or their agents, as to give extension to the lots in that range so far westwardly as the Bacon lot, and so far as to include the demanded premises as part of lot No. 72. This lot was granted to Robinson, according to Winslow's plan; and the tenant holds what was granted to Robinson and nothing more.

When land is granted or conveyed according to a certain plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence, than

if all the particulars of the description had been actually inserted in the body of the grant or deed. Now it is clear that according to Winslow's plan lot No. 72 extends only three miles from the river; and if the grant to Robinson had been made before the Bacon lot was located and Jones' survey completed, the lot would not have been extended so as to embrace the land in dispute. We are then to inquire whether the location of the Bacon lot by McKecknie, or the survey and plan of the rear lands made by Jones do in legal contemplation alter the case.

When McKecknie located the Bacon lot, he measured for himself to ascertain the west line of the third range, or in other words the end of the three miles from the river; and it appears by the plan taken in the present case, that he made seventy-two rods large measure; and therefore, though in the description of the bounds of that lot, it is said to adjoin the lots in the third range, it is in fact seventy-two rods to the westward of that range. This was evidently an error on the part of McKecknie; and the lot was located by mistake seventy-two rods farther west than was intended. It seems that the proprietors were not aware of this error when they employed Jones to survey and make a plan of the lands south of the Bacon lot and westward of the third range of Winslow's lots; and it is equally clear that Jones himself was not conscious of it at the time he executed the duty assigned him. He proceeded on the mistake made by Mr. McKecknie, and when he copied Winslow's plan and laid those lots down on his own plan, he continued the mistake by representing those lots as extending westward as far as the Bacon lot. It is not contended that Jones knew the rear line of the settler's lots, or in other words the west line of the third range; he never run that line or attempted by any correct process to ascertain its true position.

We do not question the correctness of the decisions on which the counsel for the tenant relies. In the case cited from Johnson, the lands had been surveyed, and certain monuments erected before the deeds were executed; and the description was variant from the previous survey. The court there decided that the generality of the language of the deed as to the lot, should be explained and corrected by the actual survey, which had been made in contemplation of the conveyance.

In the case of *Makepeace v. Bancroft*, 12 Mass. 469, the monument referred to in the deed did not exist at the time of the execution, but afterwards the brick wall, being the monument described, was erected, and was intended to conform exactly to

the deed, though it did not. Yet the court decided that this monument must govern the construction. It was intended to govern it. The language of the court in that case is this: "If a deed of land pass at a distance from the premises granted and reference should be made to a stake or stones for the termination of one of the lines, no such monument actually existing, and the parties should afterwards fairly erect such monument with intent to conform to the deed, we think the monument so placed would govern the extent, although not entirely coinciding with the line described in the deed." The case at bar differs from that case in two important particulars:

1. The deed referred to a certain monument at the end of the line, but there is none referred to on Winslow's plan at the end of the third mile; 2. In the case of *Makepeace v. Bancroft*, the monument named in the deed, was erected with the express view of conforming to the deed. In the case before us the acts done by the agents of the proprietors, which are relied upon as a proof of an extension westward of the lots in the third range, and a location of the west line of said range, were all performed for other purposes, and without any intention to settle the western boundary of the range.

It is admitted, or not denied, that the tenant holds the lot which he purchased, and has his complement of acres. The lot is a mile long, exclusive of the demanded premises, and as wide or wider than represented on Winslow's plan. No injustice then is done to the tenant.

We do not perceive any principle of law, and certainly none of justice, which calls upon us to pronounce that such a mere mistake of a surveyor of the proprietors, of which they had no knowledge until after the lapse of many years, and which has not violated the rights of any who claim under their grants, has had the effect completely to divest those proprietors of their legal right and title to a valuable tract of land. The location of the Bacon lot was not made with the intent to settle the western line of the third range, nor was Jones' survey made for that purpose. There is then no express location or extension of the lots in the third range as the tenant's counsel contends; and if such effect is to be considered as produced by implication, it is an implication resulting from ignorance instead of knowledge—from mistake instead of intention.

It is known to some of the court that several years since a question similar to the present arose respecting a tract of land in Vassalborough. The facts in the case alluded to were nearly

the same as in this; a similar error was committed by the surveyor who run out and made a plan of the lands in the rear of the third range, surveyed before by Winslow. Upon accurate admeasurement, it was found that the fourth range did not adjoin the third, as was supposed when it was located. The cause was tried before the supreme judicial court of Massachusetts, and they were clearly of opinion that the lands situated between the termination of the third tier of lots in Winslow's plan, or the end of three miles from the river, and the fourth range, as located by monuments, were the property of the proprietors, and the decision was conformable to this opinion. It is understood that all concerned have acquiesced in it.

For the reasons we have assigned, we are all satisfied that the evidence offered by the tenant was properly rejected, and of course that there must be judgment on the verdict.

## STINCHFIELD v. LITTLE.

[1 GREENLEAF, 231.]

**PUBLIC AND PRIVATE AGENTS.**—Where a duly authorized public agent enters into a contract on behalf of the government, but affixes his own name and seal to it, it is nevertheless the contract of the government and not of the agent. But if the principal is a private person or corporation, the contract must be executed in the name and under the seal of such principal in order to bind him; and if the agent puts his own name and seal to it, he will be personally bound, though he describes himself in the body of the contract as acting for his principal, for this is mere *descriptio personæ*.

**ACTION of covenant on a deed.** *Plea, non est factum.* The deed declared on was offered in evidence, and was as follows: "Know all men by these presents, that I, Josiah Little, of, etc., by virtue of a vote of the Pejebscot Proprietors, passed on the first day of September, 1784, authorizing and appointing me to give and execute deeds for and in behalf of said proprietors, for and in consideration of the sum of thirty-seven pounds to me in hand paid by Thomas Stinchfield, of, etc., the receipt whereof I do hereby acknowledge, have given, granted, released, conveyed and confirmed unto him, the said T. S., his heirs and assigns forever, two hundred acres, etc. To have and to hold the above-granted and bargained premises, with all the privileges and appurtenances thereof, to him, the said T. S., his heirs and assigns forever, as an absolute estate of inheritance in fee-simple forever; hereby covenanting in behalf of said pro-

prietors, their respective heirs, executors and administrators, to and with the said T. S., his heirs and assigns, to warrant, confirm and defend him and them in the possession of the said granted premises, against the lawful claims of all persons whatsoever. In testimony that this instrument shall be forever hereafter acknowledged by the said proprietors as their act and deed and be held good and valid by them, I, the said Josiah Little, by virtue of the aforesaid vote, do hereunto set my hand and seal, this nineteenth day of February," etc., with the defendant's name and seal attached. The defendant objected that this was the deed of the Pejebscot Proprietors, and not of the defendant. The judge sustained the objection, and directed a nonsuit, which the plaintiff moved to set aside.

*Belcher and R. Williams*, for the plaintiff.

*Little and Longfellow*, for the defendant.

By Court, PREBLE, J. In this case two questions are presented for the consideration of the court: 1. Is the deed declared on, the deed of the Pejebscot proprietors? 2. Admitting it not to be the deed of the Pejebscot proprietors, is it the deed of Josiah Little, the defendant?

Where a contract is entered into, or a deed executed in behalf of the government by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government who alone is responsible, and not of the agent: *Unwin v. Wolseley*, 1 T. R. 674; *Macbeth v. Haldimand*, Id. 172; *Hodgson v. Dexter*, 1 Cranch, 345; *Dawes v. Jackson*, 9 Mass. 490; *Sheffield v. Watson*, 3 Cai. 69. But the same rule does not obtain in relation to the agent or attorney of a private person or corporation. It seems to have been settled or recognized as law in courts of justice by judges, distinguished for their wisdom and learning, in successive generations, and under different governments, that in order to bind the principal or constituent, and make the instrument his deed, the agent or attorney must set to it the name and seal of the principal or constituent, and not merely his own. In the year 1614, it was resolved in *Combe's case*, 9 Co. 76, that, "when any one has authority as an attorney to do any act, he ought to do it in his name, who gives the authority; and the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority."

There however the act, done by attorney, was the surrender

in court of certain copy-hold lands, in doing which, as is well known, neither signing nor sealing constituted any part of the ceremony. A case where a question, relating to the receiving of such a surrender, was agitated, came before the court of K. B. in 1701, *Parker v. Kell*, 1 Ld. Raym. 658, in which Ld. C. J. Holt, seems to be dissatisfied with the rule in *Combe's case*, and expresses an opinion that, though the act were done in the attorney's own name, provided he had sufficient authority, it would be good without reciting his authority, though not so regular and formal. The rule however, as laid down in *Combes' case* is cited by Ld. Ch. Baron Comyn, as good law: Com. Dig. Attorney (C. 14), and 1 Rol. 330, l. 35, is quoted as supporting it.

Upon the same authority it is stated, that if an attorney has a power by writing to make leases, if he make a lease in his own name, it will be void. This latter principle was recognized as law in 1726, in *Frontin v. Small*, 2 Ld. Raym. 1418. In that case also the attorney in the body of the instrument for, and in the name, and as attorney of the principal, demised, etc.; but the court held, that a person, empowered by warrant of attorney to execute a deed for another, must execute it in the name of the principal. In conformity with this decision is the language of Ld. C. J. Kenyon, in 1795, in *White v. Cuyler*, 6 T. R. 176. "In executing a deed for the principal under a power of attorney, the proper way is to sign in the name of the principal." And at a still later period in 1802, in *Wilkes v. Back*, 2 East. 142, the doctrine, that an attorney must execute his power in the name of his principal, and not in his own name, was recognized by the whole court, as sound law. The same rule seems to obtain also in the courts of law in this country. Thus in *Simond v. Callin*, 2 Cai. 66, C. J. Kent not only admits the authority of *Frontin v. Small*, but adds, "when a man acts in contemplation of law by the authority, and in the name of another, if he does an act in his own name, although alleged to be done by him as attorney, it is void." So also in *Fowler v. Shearer*, 7 Mass. 14, C. J. Parsons, in delivering the opinion of the court says, "if an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney; otherwise the conveyance is void. And it is not enough for the attorney in the form of the conveyance to declare, that he does it as attorney, for, he being in the place of the principal, it must be the act and deed of the principal,

done and executed by the attorney in his name." This it is manifest, is only a combination of the principles of the two cases of *Combes* and *Frontin v. Small*, and as such is a recognition on the part of the court of the law, as laid down in those cases.

But in the case of *Elwell v. Shaw*, 16 Mass. 42 [8 Am. Dec. 126], this subject was again brought in review before the court. There the deed in question commenced with a recital at full length of the power of attorney from Jonathan to Joshua Elwell, and the attorney, professing to act only in virtue of that power, proceeds to convey, etc., and then concludes: "In testimony whereof, I have hereunto set my name and seal of the said Jonathan," etc., but affixes his own name and a seal. In delivering their opinion, the court say it is impossible that any one should doubt the intention of the parties, but, yielding to the weight of the authorities, they held the deed not to be the deed of Jonathan.

Now when we advert to the deed under consideration, we find the case of *Elwell v. Shaw*, a much stronger one than the present. There the attorney professing to set the name and seal of the principal, set a seal, but signed his own name. Here the attorney did not even profess to set the name or seal of the principal, but professedly as well as actually set his own. It has indeed been intimated in argument that the case of *Elwell v. Shaw*, is an extreme one, bordering at least exceedingly near on the line. Be it so, all cases bordering exceedingly near on the line are extreme cases. We do not rest the decision of this cause upon that case merely, however safely we might do so, but upon well settled and established principles in other cases which have been too long and too often recognized to be now called in question. Applying those principles to the case at bar, we are of opinion that the deed in question is not the deed of the Pejebescot Proprietors.

This is not the case of a deed good in point of form, but void for want of power in the person assuming to act as attorney. In such a case whether the attorney is bound by the instrument itself, or only responsible in an action on the case, it is not necessary for us now to consider. For the purpose of this inquiry, and in the form in which the question is presented for consideration, it is granted that Little had sufficient authority to bind the Pejebescot Proprietors. If he had properly exercised the powers confided to him, it will be readily admitted he could not have been made personally responsible whatever injury the



plaintiff might have suffered for any breach of the covenants contained in the deed. It would then have been the deed of the Pejeboscot Proprietors, and not Little's; whereas, as the case now stands, it is not their deed, but his own.

Thus Chief Justice Parker in *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150]: "It is also held that, whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person." See, also, *Mahew v. Prince*, Id. 54. So in *Afridson v. Ladd*, 12 Mass. 173: "It is not sufficient that a person, in order to discharge himself from a promise in writing, should show that he was in fact the agent of another, but it should be made to appear, that he treated as agent, and actually bound his principal by the contract." Nor is it sufficient that the agent described himself in the deed or contract, as acting for, and in behalf, or as attorney of the principal, or as a committee to contract for, or trustees of a corporation, etc.; for if he do not bind his principal, but set his own name and seal, such expressions are but *designatio personæ*, it is his own act and deed, and he is bound personally: *Fowler v. Shearer*, *supra*; *Appleton v. Binks*, 5 East, 148; *Tippets v. Walker*, 4 Mass. 595; *Tucker v. Bass*, 5 Mass. 164; *Thft v. Brewster*, 9 Johns. 334 [6 Am. Dec. 280]; see, also, *Thacher v. Dinmore*, 5 Mass. 299 [4 Am. Dec. 61]; *Barry v. Rush*, 1 T. R. 691; *Sumner v. Williams*, 8 Mass. 162; *Long v. Colburn*, 11 Mass. 97 [6 Am. Dec. 167]. Besides since the deed cannot *proprio vigore* operate as the deed of the Pejeboscot Proprietors, the last clause of it might well be considered perhaps as is contended by the plaintiff's counsel, under a fair construction of it, the personal covenant of the defendant, that the Pejeboscot Proprietors should acknowledge that instrument to be good and valid, and equally obligatory on them, as though it were their own act and deed: See *Mann v. Chandler*, 9 Mass. 335; *Appleton v. Binks*, and *Tippets v. Walker*, *supra*. But without resorting to such construction, we are of opinion that the deed is the deed of Josiah Little, the defendant, and accordingly the non-suit is set aside and a new trial granted.

MELLEN, C. J., having been of counsel, gave no opinion.

## MILLIKEN v. COOMBS.

[1 GREENLEAF, 343.]

**ANTE-DATING POWER OF ATTORNEY, ESTOPPEL BY.**—If a principal dates back a power of attorney to legalize a prior act of the attorney, he is estopped from showing that it was executed subsequently.

**SUBSEQUENT RATIFICATION OF ATTORNEY'S ACT.**—Where an attorney appointed by parol executes a bond in the name of the principal, and afterwards the principal gives him a regular power of attorney dated prior to the bond, this is a good ratification of the bond.

**DEBT ON AN ARBITRATION BOND DATED MARCH 1, 1815.** Plea, *non est factum*. The bond declared on, which was produced in evidence, purported to have been executed by one Wheaton, as agent and attorney of the defendants, by virtue of a power of attorney, dated January 9, 1815. To prove the attorney's authority, the plaintiffs introduced a power of attorney from the defendants dated February 1, 1815, but which was shown to have been executed, in fact, March 16, 1815. It appeared also that the arbitrators met and heard the parties, and made and published their award April 19, 1815, at which hearing several of the defendants were present, and no objection was made to the authority of Wheaton to enter into the submission on behalf of the defendants.

The defendants objected to the evidence as not sufficient to support the bond, and produced in evidence a power of attorney to Wheaton from eight of the defendants dated January, 9, 1815, in which all the defendants' names were recited, but four of them never executed it. It was the same in substance as that dated February 1. This defective power the defendants claimed was the one referred to in the bond. The judge overruled the objection to the bond, and the plaintiffs had a verdict subject to the opinion of the court.

*Orr and Thayer*, for the defendants.

*Greenleaf and Wheeler*, for the plaintiffs.

By Court, WESTON, J. The only question in this case arises from the objection made to the sufficiency of the power of attorney, under the authority of which the arbitration bond was executed. It is urged that the power recited in the bond being described as bearing date January 9, 1815, that which was produced in evidence by the plaintiffs bearing date February 1, 1815, can have no tendency to give effect to the bond, and this position is further attempted to be supported on the part of the

defendants by the production of a power of attorney corresponding exactly in date with that recited in the bond, but which, though it purports to be the power of all the defendants, eight in number, was in fact executed by only four of them.

It may be convenient first to consider, whether if there had been no instrument of January, that of February could be received to support the bond; and secondly, if so, whether it is rendered inadmissible by the existence of the former power.

To give effect to the bond, as against the principals, it was only necessary that the attorney should have had in fact a sufficient power from them; its date was entirely unimportant, except that it should appear to be anterior to the execution of the bond. The production, therefore, of the power of February, being of a prior date, proved the material fact recited in the bond. This sufficiently supported the authority the attorney claimed to exercise, and justified the execution of the bond in behalf of his principals. That he possessed a power was all that was necessary for him to set forth in the bond, and the insertion of its date was altogether gratuitous and unnecessary.

A misrecital in this particular, accidental or designed, cannot be permitted to vitiate the proceedings, and to dissolve an obligation, which the principals had undertaken through the agency of an attorney, who was in fact duly and legally authorized. Even in the conveyance of real estate, that the intent of the parties may prevail, some particulars in the description in the deed, not essential to ascertain the estates conveyed, inconsistent with others which are essential may be rejected, and will not be permitted to defeat the general intent of the parties: *Worthington v. Hylyer*, 4 Mass. 196.

But shall the existence of the instrument of January render that of February inadmissible; the former and not the latter date being recited in the bond? Had that of January been executed by all the principals, according to its purport, there would be no question that it must have been deemed to be the power intended in the recital in the bond. But although it corresponds to the recital in one particular, namely, as to its date, it varied from it in another, altogether essential, it not being executed by all the principals, which is the power set forth and recited. The unexecuted power therefore of January must be altogether rejected, varying both in form and substance from that recited; and that of February, which was the effectual and valid power, must be deemed to be that intended by the parties in the bond of arbitration. Indeed by the execution of the

new power, the parties appear to have abandoned that of January, which had not been completed according to its terms.

It is further contended that the power relied upon, not having been executed until after the date and delivery of the bond, can give no validity to that instrument. The power was executed prior to the meeting of the arbitrators, and there can be no doubt that it was antedated, that it might appear as a subsisting power at the time of the execution of the bond; and that the principals might thereby be concluded from questioning the authority of their attorney. In this point of view the date becomes material, and must have been so considered by the parties. The defendants are therefore estopped by their deed to aver or to prove that it was in fact executed at a subsequent period. In the case of *Cady v. Eggleston*, 11 Mass. 282, cited by the counsel for the plaintiffs, which was a debt upon a replevin-bond, which bore date at the time of the service of the writ, but was not in fact executed by Eggleston, the principal, until after the entry of the replevin suits, Parker, C. J., in delivering the opinion of the court observes, speaking of the bond executed by Eggleston, the principal, "he is estopped to say that it was made on a day different from its date, and must be considered as having given force and effect to it on the day of the service of the writ of replevin." The analogy in this particular between the case cited and the case at bar, is very striking.

But if the defendants are not estopped from showing the true time of the execution of their power, it may well be considered a confirmation of the authority assumed by their attorney; it being very apparent that the power was antedated that it might have that effect. That a subsequent assent is tantamount to a precedent authority, is a familiar and well-settled principle, as to all acts done for another, in which a parol power only is necessary. There seems to be no good reason why the same principle should not be extended to cases in which an authority under seal is essential, provided the subsequent assent or recognition be proved by an instrument of equal solemnity, and provided, as in this case, it be dated back to a period anterior to the execution of the deed or obligation it is intended to ratify.

The defendants having first authorized their attorney to submit the matters in controversy between the parties to arbitration, with a full knowledge that this had been done, were present, either in person or by their agent, at the hearing before the arbitrators, managing and conducting the business, and making no objection to their authority. Had the result

been in their favor, the plaintiffs must have been bound by it; and we can discern no reason, either in law or equity, why the defendants should not be equally bound. Judgment must therefore be entered upon the verdict.

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## LLOYD v. JEWELL.

[1 GREENLEAF, 352.]

**FAILURE OF CONSIDERATION AS DEFENSE.**—In an action on a promissory note for the purchase-money of land conveyed with covenants of seisin and warranty, failure of title, or want of title in the grantor, is no defense.

**SAME.**—And where the deed contained a condition that upon breach of any covenant therein the damages might be paid in cash to the amount received in money, and the residue by surrendering such notes given for the purchase-money as remained unpaid, in an action on one of the notes, some of them having been paid, it was held that the defendant could not show a breach of the covenant of seisin for part of the land, to the value of the note.

**ASSUMPT** on a promissory note. Plea, the general issue. The note in question was one of six given by the defendants to the plaintiff, for the purchase-money of a certain tract of land, three of the notes having been already paid. The defendants offered in evidence the plaintiff's deed containing the following covenant: "And I do covenant with the said Jewell and Manuel, their heirs and assigns, that the premises aforesaid are free of all incumbrances by me made, that I have good right to sell and convey the same to the said Jewell and Manuel as aforesaid, and that I will warrant and defend the same to the said Jewell and Manuel, their heirs and assigns forever, against the lawful claims and demands of any person other than the said Jewell and Manuel, their heirs and assigns, upon condition that the said Jewell and Manuel, their heirs and assigns, shall not demand or receive of the said James Lloyd, his heirs, executors, or administrators, by virtue of the grant or covenant aforesaid, either express or implied, and for the breach or non-performance of the same, any greater or further sum than the amount of the consideration aforesaid, with interest thereon after two years, payable in cash to the amount received on said notes, and the residue by delivering up to be canceled such of the aforesaid notes as shall remain unpaid." The defendants further proved that as to part of the premises the plaintiff had no title at the time of the conveyance, but that the same was in

the possession of a stranger who was the lawful owner, and that the value of such part exceeded the amount of the note sued on. To all this evidence the plaintiff objected, but the judge, for the purpose of presenting the question to the whole court, overruled the objection, and after a verdict for the defendants, the plaintiff moved for a new trial, on grounds which appear from the opinion.

*R. Williams*, for the plaintiff.

*Allen*, for the defendant.

By Court, *MELLEN*, C. J. In the argument of this cause several questions were presented for consideration, which may be resolved into the three following: 1. In an action on a promissory note, payable at a given day, brought by the promisee or his representatives against the maker or his representatives, given for the price of real estate conveyed by the promisee to the promisor by deed containing the usual covenants of seisin and warranty, is it competent for the defendant to show by way of defense a total or partial failure of title, or want of title in the grantor, at the time of his making the conveyance? 2. If not, then is it competent for the defendant in this case to do it, in consequence of the special language of the plaintiff's covenants in his deed as to the limitation of his liability in damages, and the mode of paying them? 3. If so, is it competent for him to avail himself of any advantage from the special language of the covenants in an action on the particular note sued in this case; two other notes, given at the same time, and for part of the consideration of the land sold, still remaining due, and not yet demanded?

As to the first point, we would observe that for a long series of years the practice in Massachusetts has proceeded upon the principle that the covenants in the deed of conveyance, or, if no deed had been given, but only a bond or covenant to give a deed, then such bond or covenant constituted a good and valuable consideration for the note, and of course a want or failure of title would be no legal defense to an action on such note; and we had considered such to be the true principle of law in relation to this question; but the cases decided in New York, cited from *Johnson* by the counsel for the defendants, in which such a defense was considered substantial, have induced us to look carefully into those cases, and to examine the point with more attention, respecting, as we do, the high character and learning of the court which pronounced those decisions.

It is a principle of law, universally acknowledged, that *assumpsit* will not lie when the debt is due by specialty, for in such case the specialty ought to be declared upon: Bull. N. P. 128. It is equally clear that if a debt due by simple contract be afterwards secured by specialty, the original cause of action is merged. Hence it is plain in the case before us, that whatever claim the defendants have upon the plaintiff is secured by the covenants in his deed; and if they can avail themselves, in this action of *assumpsit*, of the failure of title by way of defense, it is more than they could do in character of plaintiffs demanding damages. These propositions require no authorities to support them. It is also plain that the defense proposed cannot be made by way of set off against the plaintiff's demand; because our statute upon this subject is not so broad as the English statute, and does not in any case authorize a defendant to set off a debt secured by a specialty or a promise in writing.

Where there are several covenants, promises, or agreements, which are independant of each other, one party may bring an action against the other, without averring performance on his part, and it is no cause for the defendant to allege in his plea a breach of the covenant on the part of the plaintiff: 1 Saund. 320, note 4; Yelv. 134, note 1, and cases there cited. In those cases in the books in which the question was whether the promises of covenants were mutual and independent, or dependent, the contract or undertaking on both sides was of the same character and grade; not covenant on one side, and *assumpsit* on the other, as in the case at bar. Another well established rule of construction is, that the intent of the parties, and not the mere arrangement of the words, ought to govern: 1 Saund. 320, note 4. Thus if a day be appointed for payment of money, and the day is to happen, or may happen before the thing which is the consideration of the money is to be performed, an action may be brought for the money when payable, and before performance, for it appears the party relied on his remedy, and did not intend to make the performance a condition precedent: Id., note 4.

In the case supposed in the point under consideration, the note is payable on a certain day; and yet the covenant to warrant and defend might not be broken for many years after. Another objection against allowing the defense proposed in an action on the note arises from the amount of damages which may become due in consequence of the failure of title to the

lands conveyed. By our law, in case of eviction, the grantee or his assignee, as the case may be, is entitled to recover the value of the lands at the time of eviction. This may be twice the amount of the consideration secured by note, and it may be not half that amount. Hence also the propriety of considering each contract separately and independently of the other, so that each may have its proper operation and no more, and both parties be subjected to their respective legal liabilities, according to the principles laid down in *Boon v. Eyre*, 1 H. Bl. 273, n. 1; and *Duke of St Albans v. Shore*, Id. 270.

It has been urged that public policy requires that the proposed defense should be allowed, and several cases have been cited to support this argument. In the case of *Everett v. Gray*, 1 Mass. 101; and *Taft v. Montague*, 14 Id. 282 [7 Am. Dec. 215], the defense grew out of the unfaithfulness of the work for which the plaintiffs were seeking compensation, and so not like the present. In 3 T. R. 438, the covenant of the plaintiff with the defendant amounted to nothing; it gave him no remedy against the plaintiff, and the permission to the defendant to use the patent frame, gave him no rights. It was not a new invention, and the whole was a fraud. The case of *Bliss v. Negus*, 8 Mass. 46, was *assumpsit* on a promissory note, given for the assignment of all the plaintiff's right, under a certain patent, with a covenant to warrant the same to the defendant; and it was proved that the plaintiff had no right, and that nothing passed by the assignment; and there being nothing on which the covenant could operate, it was a dead letter, and could not form a consideration for the note. The case of *Sill v. Rood*, 15 Johns. 280, only decides that in an action on a promissory note given for a chattel, the defendant may show deceit in the sale, under the general issue. *Frisbie v. Hoffnagle*, 11 Id. 50, was an action of trover for certain promissory notes given for lands purchased, the title to which had wholly failed; and the court decided that the consideration for the notes had also failed, though the lands were conveyed with warranty. This case is admitted to be, in principle, directly in point for the defendants; but on examination of the cases of *Morgan v. Richardson*, 1 Campb. N. P. 40, note; *Tye v. Gynne*, 2 Campb. 346; and *Barber v. Backus*, Peake's Ca. 61, all of which are cited at the end of *Frisbie v. Hoffnagle*, it will be found that they are totally different from that case in principle, and do not in any degree support it. They relate merely to an alleged failure of the whole or a part of the consideration of bills of exchange given for articles which were defective.



The other case cited for the defendant was *Winter v. Livingston*, 13 Johns. 54. That was *assumpsit* on three promissory notes signed by Livingston for the price of a tract of land. About a month after the date of the notes, Winter covenanted with Livingston to convey the land in fee-simple to him, on the express condition that the covenant should be void if the several notes should not be paid at the times they should respectively become due. They were not paid. The court in delivering their opinion say: "By this covenant, however, it was provided that the agreement was to be void unless Livingston paid his notes as they fell due. He did not pay them, and of course the agreement was void if Winter elected so to consider it, and the case shows that he availed himself of this forfeiture, for he went on and sold the land for his exclusive benefit; and Livingston has therefore received nothing for his notes, and Winter has a complete and perfect title to his lands." It is clear that this case does not in any degree support the principle it was cited to establish. The only authority, then, opposed to the principle which has been so long recognized in Massachusetts, is the case of *Frisbie v. Hoffnagle*, and that is an insulated case.

In the case of *Fowler v. Shearer*, 7 Mass. 14, the action was founded on a promissory note, and the defense was a want of consideration. The note was given in payment for land conveyed by a married woman alone, with covenants in the usual form. The only consideration pretended was this deed, by which nothing passed; and Parsons, C. J., said: "The defendant cannot derive any advantage from any covenant in the deed. She is not answerable on any of her covenants. I do not, therefore, see any consideration sufficient to support this promise." It is evident that if the covenants had been good and binding, they would have been a good consideration for the note. The case of *Smith v. Sinclair*, 15 Mass. 171, recognizes and proceeds on the principle that the bond to convey the tract of land for which the note declared on was given, constituted a good consideration for the note though there was a partial failure of title by a previous mortgage. And in addition to the authority of these decided cases, it may not be improper to notice the argument *ab inconvenienti* urged by the counsel for the plaintiff. It is certainly unusual to try the title to real estate in actions of *assumpsit*, and in the present case, should the defense be allowed, and the sum now sued for not be recovered, but in evidence set off against the breach of one of the covenants in his deed, the record would disclose no facts on which the plaintiff

could found his action against his warrantor for reimbursement. These, to say the least, are great inconveniences, which may all be avoided by a steady adherence to settled principles, in preference to consulting individual convenience, or merely preventing circuitry of action.

With respect, therefore, to the general question which we have been considering, we all agree in deciding it in the negative.

As to the second question, whether the general principle is changed by the special language in the covenants on the part of the plaintiff, we are well satisfied that it is not. The clause relied on by the defendant was introduced for the benefit of the plaintiff, and the object was to limit his accountability, whatever might be the consequences as to the title, and reserve to himself the liberty of paying the damages which might be recovered against him, in the defendant's own notes, in whole or in part, provided they should not have been paid at the time of such recovery of damages. Viewing the special provision in this manner, it is clear that the defendant has no rights reserved to him by it, and upon no fair construction can it be considered as dispensing with the rules of evidence, or altering the principles of law in the decision of the merits of the cause.

It has now become unnecessary to decide the third question before proposed; though we are inclined to believe that if the defense offered could be made in any form against either of the notes, the plaintiff might elect to have the damages paid by giving up one of the other notes, so as to avail himself of the costs of this action, which was properly commenced. But on this point we give no opinion.

We are all agreed that the evidence on which the defense prevailed was improperly admitted, and accordingly the verdict must be set aside and a new trial granted.

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## CROSS v. PETERS.

[1 GREENLEAF, 376.]

**RESCISSIO OF SALE BY VENDOR.**—A vendor cannot rescind a contract of sale and reclaim the goods on the ground of fraud, unless it appears that he was induced to part with such goods by deceptive assertions and false and fraudulent representations of the vendee; and the fact that the vendee was insolvent, and the goods liable to immediate attachment by his creditors, which was unknown to the vendor, is no ground for rescission.

**REPLEVIN** for certain goods. The defendant traversed the title of the plaintiffs, and pleaded property in one William Parker. The facts were: the goods were purchased of the plaintiffs by Parker on the eleventh of March, 1821, on four months credit, no note being given, and no bill taken. On the same day, Parker stopped payment. It did not appear that Parker knew of his insolvency, nor had the plaintiffs any knowledge of that fact. At the time of the purchase, Parker was indebted to one Holm, who had indorsed for him to a considerable amount. On the very day of the purchase, Holm took a note from Parker, payable on demand, to cover the amount of his indorsements, and immediately sued out an attachment and levied it on Parker's property, including the goods in question. The defendant, a deputy sheriff, by virtue of this attachment, had possession of the goods when they were replevied. There was no evidence of any false or fraudulent representations by Parker when he bought the goods, or of any fraud or collusion between him and the attaching creditor. The plaintiffs however insisted that there was collusion, and also that Parker's concealment of his insolvency was of itself sufficient ground for rescinding the sale. But the judge instructed the jury that Parker's insolvency, unattended by misrepresentations or falsehood, would not avoid the sale, and that unless they believed that he obtained the goods with a fraudulent intent, and pursuant to a secret understanding with Holm that they should be attached to secure his debt, they should find for the defendant; otherwise for the plaintiffs.

There was a verdict for the defendant, whereupon the plaintiffs moved for a new trial on the ground of misdirection, and also on the ground that Parker was examined as a witness in the case, against the plaintiffs' objection.

*Todd*, for the plaintiffs.

*E. Whitman*, for the defendant.

By Court, **MELLEN**, C. J. Two questions are presented for consideration; one, as to the admission of Parker as a witness; the other, as to the opinion delivered by the presiding justice to the jury.

As to the first question, the objection seems unfounded. The case finds that the goods the witness purchased have not been paid for. He therefore stands entirely indifferent. He is liable to the plaintiffs for the price of the goods, if they do not succeed in this action; and will remain liable to Holm if they

do succeed. Let this cause be decided either way, one of the witness' debts must be canceled, and the other will remain due and unpaid. To this point may be cited the case of *Bean v. Bean*, 12 Mass. 20. The objection as to interest, therefore, fails. But it is urged that he is inadmissible on the ground of his connection with the alleged fraud. In the case in 4 Mass. 492, cited by the plaintiffs' counsel, such an objection is considered as no objection.

As to the other point reserved, the presiding justice instructed the jury that unless they should be satisfied that the goods replevied were purchased by Parker pursuant to some secret agreement or understanding between him and Holm, so that they might be attached by Holm for his indemnity, they ought to find in favor of the defendant. It is now necessary to examine and determine whether that instruction was correct. If not, the verdict must be set aside and a new trial granted. As it appears by the report of the case that no arts or devices were practiced, nor any false representations or pretenses whatever were made by Parker at the time of purchasing the goods on credit, or at any other time, by means of which he obtained the credit; and as the jury have found that there was no such concert or secret agreement or understanding between Parker and Holm; and as it does not appear that Parker knew, at the time, that he was insolvent, though in fact he was so, the simple inquiry is this: "If a man, doing business as a trader and in good credit (though insolvent at the time, but not aware of that fact), obtains goods on credit in the town where he lives and is known, without practicing any artifice or making any false representations or pretenses, or in fact any representations or pretenses at all, and removes these goods to his own store openly, can such vendor, upon learning the insolvency and circumstances of the purchaser, reclaim the goods in possession of the purchaser, or maintain replevin for them against the attaching officer, on the principle of his legal right to rescind the bargain? This seems a clear and fair statement of the question.

If in the present case the plaintiffs had a right to rescind the contract of sale, it must be on the ground of fraud on the part of Parker, the purchaser; and though in many instances contracts may be avoided by reason of the fraudulent conduct of one of the parties; and the party attempted to be charged may, for that cause, be excused from the performance of his contract; yet in cases of the kind under consideration, where a vendor claims the right of rescinding a contract of sale which has been

carried into effect and executed on his part by a delivery of the articles sold, it would seem that his right to rescind must be founded on such a fraud on the part of the vendee as would render him liable to an indictment; or if not, would at least subject him to an action of deceit; or in other words, that a vendor has not a legal right to rescind a contract of sale and reclaim the goods sold, unless such fraud was practiced in making the contract that if the vendor did not rescind it, he would recover damages against the vendee for the injury sustained by that fraud. But without advancing any direct opinion as to the correctness of the principle, it appears to us to be clear that it would require as much proof of fraud and false representation to maintain an action against a vendee in the above circumstances, as an action against a third person, by whose fraudulent and false representations the vendor was induced to give credit to the vendee. Artifice, misrepresentation, falsehood and fraud constitute the foundation of all such prosecutions. It may not be useless to examine the subject in both points of view.

In the case we have stated, would an indictment lie against the purchaser?

1. Cheating at common law was an indictable offense, but to constitute the offense two things were necessary: First. The act must be of such a nature as to affect the public; Secondly. It must be such against which common prudence could not have guarded: 1 Hawk. Ch. 71; 2 Burr. 1125.

2. The statute of 33 Hen. VIII., ch. 1, made it an offense to obtain money, goods, etc., by a false token. Though this statute in some respects altered the common law, it did not affect those cases against which common prudence would be a sufficient security.

3. The statute of 30 Geo. II., ch. 1, goes still further, and makes it an indictable offense to obtain money, goods, etc., upon a false pretense. Before this last statute was enacted, it was not an offense to obtain money, goods, etc., by a false pretense, unless false tokens were used: See 6 Mod. 42, 61, 105, 301; 5 Id. 11; 11 Id. 222; Ld. Raym. 1013.

This statute was never in force in Massachusetts, as we are informed by Parsons, C. J., in the case of *Commonwealth v. Warren*, 6 Mass. 72. But the Stat. 1815, ch. 136, contains similar provisions, and therefore those decisions which we meet with in the English books upon the Stat. Geo. II., are applicable to the statute of 1815.

In the case of *Young v. Rex*, 3 T. R. 98, it is decided that to bring a case within the act of Geo. II., there must be false pretenses or stories, and misrepresentations, deceiving and intended to deceive the person with whom the offender is dealing, and fraudulently contrived for that purpose. Buller, J., says: "Barely asking another for the sum of money, is not sufficient, but some pretense must be used, and this pretense must be false, and the intent is necessary to constitute the crime." The case of *Rex v. Lara*, 6 T. R. 565, shows the nature of those false tokens and pretenses which are necessary to support an indictment. Lara pretended that he wished to purchase certain lottery tickets to a large amount. He did so, and paid for them by a draft on a certain banker, with whom he said he had funds, though at the time, he knew he had not. The court decided that the indictment could not be maintained. Lord Kenyon observed that Lara used nothing but his own assertion to gain credit, "that he sat down and drew a check on a banker; but it would be ridiculous to call that a false token, that it left his credit just where it was before. What the defendant did was highly reprehensible and immoral, but as he used no false tokens to accomplish his designs, judgment must be arrested."

Hawk. B. 1, ch. 71, sec. 2, says, that "the deceitful receiving money from one man to another's use upon a false pretense of having a message and order to that purpose, is not punishable by criminal prosecution, because it is accompanied by no manner of artful contrivance, but wholly depends on a bare, naked lie."

The above cited case of *Commonwealth v. Warren*, was decided before the act of Massachusetts for the punishment of cheats, was passed. Had it been in force at the time of the trial, Warren would probably have been convicted, as he used several false pretenses to obtain credit by means of which his fraud was successful. The case further shows that if another person had been connected with him in the fraud, the offense would have amounted to a conspiracy without any false pretenses, and might have been charged and punished as such. This distinction it is of importance to notice, as it may have a bearing on the main question reserved in this cause; and for that reason it may, under this head, be also remarked that where two or more conspire to do an unlawful act, or a lawful act for an unlawful purpose, it is a crime; and the gist of the conspiracy is the unlawful confederacy: *Commonwealth v. Judd*, 2 Mass. 329 [3 Am. Dec. 54]; *Commonwealth v. Tibbells*, Id. 536.

Our next inquiry is, whether in the case stated, an action of deceit, or an action on the case in nature of deceit, would lie for damages occasioned by the fraud. Our law books must answer the question.

Some of the cases relating to this point are founded upon an alleged fraud and deceit on the part of the vendor; others on the part of the vendee. Those which are grounded upon an express warranty do not come within the range of our present view. In *Ld. Raym.* 519, it is settled that possession is a warranty of the implied kind, that the goods belong to the seller; for possession is a color of title, and an action lies upon a bare affirmation of the possessor that the goods are his own: *Roberts on Frauds*, 523. "An action upon the case lies for a deceit when a man does any deceit to the damage of another." *Com. Dig.*, Action on the case for deceit, A. 1. "Fraud without damage or damage without fraud gives no cause of action, both must concur:" 3 *Bulst.* 95; *Roberts*, 523. "No action lies against a man for his declaring that a certain person would have given him a certain sum for his farm, though no such offer was ever made. It is a mere ground of estimation with which no prudent man should be satisfied;" but a declaration of the fact that the rent was so much, when it was not, whereby a purchaser is deceived, will support an action: See *Roberts*, 523, and the cases there cited. Many other cases of false or fraudulent representations on the part of the vendor might be stated, showing the principles on which actions for deceit may be maintained against them; but these are sufficient. It is much more to our present purpose to examine those cases in which actions have been supported against vendees or receivers of money, for fraud and deceit on their part, and the facts necessary to support such actions.

In the case of *Buffington v. Gerrish*, 15 *Mass.* 156 [8 *Am. Dec.* 97], Walker was guilty of gross fraud, and stated a series of falsehoods well calculated to gain him credit, by inspiring confidence in his responsibility; and by means of this fraud and false pretense he succeeded in obtaining credit to a large amount. In *Badger v. Phinney*, 15 *Mass.* 359 [8 *Am. Dec.* 105], Rand, the minor, obtained credit by falsely affirming that he was of full age; and this affirmation was pointedly made, too, in reply to the inquiries of Badger. Putnam J., in giving the opinion of the court says: "The goods were delivered to the plaintiff, Rand, because he undertook to pay for them and declared he was of full age. The basis of this contract has failed

from the fault if not the fraud of the infant; and the fraud which induced the contract, furnishes the ground for the impeachment of it. Thus in the case of *Buffington v. Gerrish*, where one purchased goods on credit by means of false representations, it was held the vender had not parted with his property, but might maintain replevin against the attaching officer."

In the case before mentioned of *Commonwealth v. Warren*, the court observed that the man defrauded should seek his remedy. In that instance false and fraudulent representations had been made. In the important case of *Pasley v. Freeman*, 3 T. R. 51, Butler, J., observes: "The fraud is that the defendant procured the plaintiff to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which they knew to be false. Here then is the fraud and the means by which it was committed; the assertion alone is not sufficient; but the plaintiff must go on and prove that it was false and that the defendant knew it to be so." The action of *Pasley v. Freeman*, was maintained upon the principle that the defendant had been guilty of that fraud and misrepresentation to induce the plaintiff to sell goods on credit to Falch, which would have maintained the action against Falch if he had himself been guilty of the fraud and falsehood. Buller, J., concludes with observing that "if a man will wickedly assert that which he knows to be false and thereby draw his neighbor into a heavy loss, he is liable in damages." Ashurst, J., in delivering his opinion says: "In order to make it actionable it must be averred that the defendant intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act and for that purpose made the false affirmation, in consequence of which they did act." If A. send his servant to buy a horse, who buys it and pays for it, and the seller affirms to A. that he was not paid, whereby A. pays him, an action lies. So if a man affirm himself to be of full age, when he is an infant, and hereby procure money to be lent on mortgage:" See Com. Dig., Action on case for deceit, A. 10, and the authorities there cited; also, *Bean v. Bean*, 12 Mass. 20.

Numerous other instances of similar imposition and falsehood might be collected and stated, but it is not necessary, as they are all founded on the same principle, viz., that the money, goods, or credit had been obtained by means of false and fraudulent assertions of the defendant. We have not been able to find a single instance in which an action of this kind has



been supported, except where the party charged had succeeded in his plan by false assertions and fraudulent misrepresentations. In 3 Chitty on Pleading are a number of forms of declarations in actions of deceit, one for selling goods as and for a larger quantity than there was; one for selling a piece of land as containing more acres than it did contain; one for misrepresenting the value or profits of a certain trade; one for representing himself as authorized, by a third person, to do a certain act or receive a certain sum of money, and one for personating the plaintiff. In each of these forms there is a strong averment that the defendant made a direct, false and fraudulent representation of facts, with an intent to accomplish his object and defraud the plaintiff, and that by means thereof he had succeeded.

We have thus taken a brief review of some of the general principles of law applicable to indictments for frauds and deceptions, and to actions on the case brought by the party injured against him who commits the fraud; whether he is the vendee of the goods or his artful and fraudulent friend. It appears by the precedents to which we have alluded, that in case for a fraudulent purchase, or obtainment of money, the declarations must contain an allegation that the plaintiff was imposed upon by artifice and false declarations, calculated and intended to deceive, and in all the cases which we have cited, the prosecution on civil action was maintained or defeated, according as the proof appeared on trial, touching the false and fraudulent representation, alleged to have been made by the party charged, he knowing them false and deceptive. Judging, then, from legal forms and decided cases, it seems to be settled that deceptive assurance and false representations, fraudulently made, are essential to the support of an indictment or civil action for a fraud committed in the manner above supposed, and of course, that such proof is equally necessary to the support of an action of replevin by the vendor who claims the right of rescinding the sale he had made on the ground of fraud in the vendee. Let us for a moment look at the facts in the case at bar. Parker, it turns out, was insolvent when he purchased the goods, but there is no proof that he was apprised of the fact, he bought the goods on credit in usual form, refusing the offer of further credit from the plaintiffs; he made no professions or promises, no representations or assertions, practiced no other art than obtaining the credit without disclosing his insolvency; a fact, which it does not appear that he himself knew. These facts are

essentially different from those appearing in the cases we have collected and stated, in which it is declared not only that there must have been assertions and representations made, but they must also have been false, and to complete the proof the defendant must have known them to be false. Under the circumstances, we are not aware of any legal principles on which an indictment could be sustained on an action for deceit against Parker, and we do not perceive how it is competent for the plaintiffs to rescind the contract they have made and reclaim the goods in this action, unless upon the ground of concealment, which had been also urged by the counsel for the plaintiffs, and which we will presently consider. As the jury have decided that no secret understanding existed between Parker and Holm of a fraudulent nature relating to this property, we do not see why the rule of law is not applicable in this instance, *melior est conditio defendentis*. The plaintiffs may have been guilty of negligence or want of due care, but as it regards the question before the court, the defendant, and he whom he represents, seem not liable even to that imputation.

But it is contended by the counsel for the plaintiffs that a vendor may rescind a contract of sale on account of fraud in the vendee by concealment of the truth as well as by false assertions and misrepresentations; that the consequences are the same and of course the law is the same. Before answering this argument, it is natural to inquire wherein this concealment consisted. It is stated by the counsel for the plaintiffs that it was the duty of Parker, as an honest man, to have disclosed his insolvency to the plaintiffs at the time he applied to purchase the property. The first reply to be given is, that it does not appear in the case that he knew he was insolvent. He might be suspicious of it, and he might not be; on that point we have no information. It does not appear, then, that he concealed any facts which he was bound to disclose. If the principles of law respecting this part of the cause were to be carried to the same extent by the court as they have been in the argument of the counsel, all confidence in dealing would be destroyed, and perfect confusion, as to the title of personal property, would be the consequence. The vendee would never feel safe in purchasing, nor any other person safe in purchasing of him, lest the creditor should afterwards discover that the vendee, when he purchased, was actually insolvent, and that those who afterwards bought of him knew of the insolvency; and then should come forward, with a sweeping claim of the property he had

sold, on the principle of rescinding the sale for a fraudulent concealment. But supposing that Parker did know of his own insolvency at the time of his contract; we are perfectly satisfied that the sale is not void on the ground of fraud because he did not disclose the fact.

It is true, the fraudulent concealment by the vendor of a secret defect in an article sold by him, wholly unknown to the vendee, may be the foundation of an action for damages by him against the vendor, and perhaps authorize the vendee to rescind the contract on discovery of the fraud; because the law implies a warranty that the goods or articles sold are of a merchantable quality: *Gilb. Ev.* 187; *Roberts*, 523. But we apprehend no case can be found by which it has been settled that the law implies anything like a warranty on the part of a purchaser that he is a man of property, and sound as to his pecuniary concerns. In the commerce and intercourse of mankind, such an implication was never understood to exist.

It is also true that in the case of policies of assurance the concealment of the truth is nearly allied to misrepresentation. If the fact be material, it avoids the policy. But it is not on the ground of fraud in the concealment that the contract is void; because if the concealment be the effect of accident or mistake, negligence or inadvertence, it is equally fatal to the policy as if it were intentional and fraudulent: See *Marshall*, 347, and cases there cited. But it will be difficult to find a case where a policy was declared void, because the assured, when the policy was effected, was insolvent and yet concealed that fact; still the reasoning of the plaintiff's counsel seems to lead to the conclusion that the policy would in such case be void because the assured was insolvent and unable to pay the note he had given for the premium. We apprehend no conclusion can be drawn from these principles of the law of insurance unfavorable to those on which we placed the decision of this cause.

We have before stated that there might be a conspiracy between two or more to obtain goods or money from another without any false pretenses, etc., and which would be punishable as a crime. In reference to this principle of law the jury were instructed that if they believed such conspiracy or secret arrangement existed between Parker and Holm, though there were no false pretenses or representations, they ought to find a verdict for the plaintiffs, but not otherwise.

It is to be lamented, if the plaintiffs have lost their property by reposing confidence where it was not deserved: but this is

not a circumstance for our consideration in the decision of the cause. On the whole, after much thought and the most careful examination, we are satisfied with the correctness of the instructions which were given to the jury; that the motion for a new trial must be overruled, and that there be an entry of judgment according to the verdict.

## ADAMS v. WISCASSET BANK.

[1 GREENLEAF, 30.]

**ACTIONS AGAINST CORPORATIONS—STOCKHOLDER'S LIABILITY.**—In an action against a town or other *quasi* corporation, having no corporate fund, the members of such corporation are parties, because their property may be taken to pay the debt; but if the action is against a bank or other private corporation, only the corporate property can be seized and sold, and a stockholder, not being personally liable, is not a party to the action.

**SHERIFF NOT DISQUALIFIED TO SERVE PROCESS.**—A sheriff who is a member of a banking corporation, may serve process thereon, because, not being personally liable, he is not a party to the action.

**ACTION** against a banking company to which there was a plea in abatement that the writ was served by a deputy sheriff who was a stockholder in the bank and therefore interested in the cause.

*Bailey and Allen*, for the plaintiff.

*R. Williams*, contra.

By Court, **MELLEN**, C. J. The question presented by the plea in abatement in this case, does not appear to have been decided in Massachusetts; nor is there any statute provisions which in express terms embraces it. It depends on the construction of the statute which relates to the service of civil processes. The first section of Revised Stat., c. 93, provides, "that every coroner within the county for which he is appointed, shall serve all writs and precepts when the sheriff or either of his deputies shall be a party to the same, and shall return jurors *de talibus circumstantibus* in all causes where the sheriff of the county shall be interested or related to either party." In all other cases the sheriff or either of his deputies may make legal service of processes within his county.

In the case of *Brewer v. New Gloucester*, 14 Mass. 216, it is decided that each inhabitant of a town is to be considered as a party to the suit, when such town sues or is sued, within the meaning of the last mentioned section, which is a transcript of a similar law now in force in Massachusetts. It is contended

by the counsel for the defendants that a stockholder in a banking institution sustains the same character in respect to the corporation, as an inhabitant of a town does to the corporation of which he is a member; and that therefore each stockholder is as much a party in a suit against the bank, as each inhabitant of a town is in a suit against such town. If this proposition be correct, the plea in abatement is good and the writ must be abated.

In the case of *Riddle v. Proprietors*, 7 Mass. 169 [5 Am. Dec. 35], Parsons, C. J., says: "We distinguish between proper aggregate corporations and the inhabitants of any district, who are by statute invested with particular powers by their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties, and hundreds in England, and counties, towns, etc., in this state." No private action, unless given by statute, lies against *quasi* corporations for a breach of corporate duty: 2 T. R. 667. Having no corporate fund, each inhabitant would be liable to satisfy the judgment. The common law does not impose this burden, though a statute may. In regular corporations having a corporate fund, this reason does not exist. But an action at common law lies against a turnpike corporation by any person specially injured by neglect to repair the road: 7 Mass. 188; and Cowp. 86, there cited. If an owner of land have sustained damage by the laying out of a turnpike road, the corporation, and not the corporators, are answerable for such damage: 5 Mass. 520. It is well known that all judgments against *quasi* corporations may be satisfied out of the property of any individual inhabitant; but an execution against a banking company incorporated, or any other proper aggregate corporation, cannot be satisfied except out of the corporate fund; neither the person nor the private property of a stockholder or corporator can be taken. The question before us must therefore be settled upon this comparison of the powers, duties, and liabilities of corporations properly so called, with those of *quasi* corporations.

In the case of *Brewer v. New Gloucester*, before cited, the court assign as the reason of their opinion, that where judgment is recovered against a town, the execution may be levied on the property of any inhabitant, and so each inhabitant must be considered as a party. It would seem to follow from this very decision, that if a banking corporation had been defendant in that action instead of New Gloucester, and Nevens, the deputy sheriff, had been a stockholder, the writ would not have been abated, because not being liable to have his property

seized on execution, he was not a party within the meaning of the statute. Suppose the Wiscasset bank should sue one of the stockholders; in such case the corporation would be one party, and the stockholder the other, and for the reasons before given, if he be a deputy sheriff the writ must be served by a coroner. Such stockholder would be a party in the fullest sense of the term, because the execution which would issue on the judgment against him would run against his person and his property.

The argument arising from inconvenience is very strong against this plea. Shares are continually changing owners, and a corporation of this kind, if disposed to be evasive, might, by frequent and secret transfers, abate every process commenced against them.

We do not consider the cases cited from Cranch and Gallison as applicable to the question under consideration. In the former case of *Bank of U. S. v. Deveaux*, 5 Cranch, 61, the supreme court sustained the action by admitting the plaintiffs to aver that they, the president, directors, and company were citizens of Pennsylvania, and the defendants citizens of Georgia. It was a mere question of jurisdiction, and for the purpose of jurisdiction the individual character of the stockholders was averred to give it. In the latter case of *Society v. Wheeler*, 2 Gall. 105, Story, J., in remarking upon the case of *Bank v. Deveaux*, says: "If the court for this purpose will ascertain who the corporators are, it seems to follow that the character of the corporators may be averred, not only to sustain, but to bar an action brought in the name of a corporation. It might therefore have been pleaded in this case, even if the corporation had been established in a neutral country, that all the members were alien enemies." But neither of these cases has a tendency to show who is a party to a suit within the meaning of our statute, and for the purpose of due service of legal process. And, accordingly, notwithstanding the research and talent displayed in support of the plea, we are of opinion that it is bad and insufficient.

WESTON, J., being interested, gave no opinion.

*Respondent ouster awarded.*

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This case was followed and relied on in *Brown v. Vinalhaven*, 65 Mo. 405; *Brown v. South Kennebec Society*, 47 Id. 281; *Mitchell v. Rockland*, 52 Id. 123; *Walham v. Kemper*, 55 Ill. 350; *Sears v. Cottrell*, 5 Mich. 270, showing the liability of quasi corporations. See on this point the note to *Riddle v. Proprietors*, 5 Am. Dec. 35. The case is noticed in *Barker v. Remick*, 43 N. H. 237, as to the competency of the sheriff to serve process.

CASES  
IN THE  
SUPREME COURT OF ERRORS  
OF  
CONNECTICUT.

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BEAN v. ATWATER.

[4 Conn. 2.]

**COVENANTS DEPENDENT AND INDEPENDENT.**—Where parties enter into an agreement for the sale and purchase of land at a future day, the purchaser to pay certain installments before that day, and on that day the seller to execute a deed of conveyance and the purchaser to pay another installment, and the balance to be paid at stated periods, and for the performance of which stipulations the parties bound themselves in a large sum, it was held in an action to recover this penalty, that the covenants of the purchaser relating to the installments to be paid before the day for conveyance, were independent, on which recovery could be had without alleging performance, but that as to the installments to be paid on the day for conveyance, as well as to the subsequent installments, the covenants were dependent, and performance, or offer of performance, a condition precedent to the seller's right of recovery.

**ACTS TO BE DONE SIMULTANEOUSLY.**—Where acts are to be done simultaneously, neither party to the covenant can recover without showing a performance or an offer to perform on his part.

**DEBT** on a covenant to recover eight thousand dollars. The plaintiff declared upon the breach of the covenants of a certain written agreement, and alleged that "he hath ever stood ready to perform said agreement on his part, of which the defendants have at all times had due notice." Plea, *nil debet*. The plaintiff gave in evidence the articles of agreement declared on, dated twenty-sixth August, 1816, between the plaintiff and the defendants, which stated that "in consideration of the herein-after mentioned covenants to be performed and payments to be made by the" defendants, the plaintiff, "by these presents, doth grant, bargain and sell" to the defendants certain lands,

which the plaintiff "covenants to confirm unto the" defendants, their heirs, etc., "by deed in fee-simple, on or before the first day of June next." And the defendants agree to pay therefor four thousand dollars, "five hundred dollars at the execution hereof (of the articles of agreement); five hundred dollars on or before the first day of January next; five hundred on or before the first day of June next;" and the remainder in three annual installments. "And for the due performance of all and singular the covenants and agreements aforesaid, each of the said parties bind themselves, and their legal representatives, to the other, and their legal representatives, in the penal sum of eight thousand dollars."

It was proved that the sum on the execution of the articles was punctually paid, but that the second installment was not paid until January 22, 1818, and then only four hundred dollars thereof. The jury were charged that there had been a breach of the covenants, but that as to the sums payable after the first two installments, plaintiff was not entitled to recover, he not having shown performance, or an offer to perform, on his part.

Verdict pursuant to instructions, and motion for a new trial on behalf of the plaintiff, on the ground of misdirection.

*Staples and Hitchcock*, for the motion.

*N. Smith and Denison*, *contra*.

HOSMER, C. J. The plaintiff can recover alone, on the facts stated in his declaration. If on examination of the covenant counted on, it appears that there has been an entire performance of every stipulation on his part; this undoubtedly evinces a good cause of action for the whole consideration of the lands; but unless the declaration comports with this state of facts, the defendants are entitled to judgment. If the plaintiff recover, it must be *secundum allegata et probata*. The plaintiff has not founded his action on a performance of contract, either in whole or in part. He has merely alleged, that the covenants of the defendants were "for and in consideration of the undertakings on his part," and instead of averring performance, he has only averred, that "he hath ever stood ready to perform said agreement." The plaintiff has placed himself on this ground; that the covenants between the parties are mutual and independent; and upon the correctness of this assumption, entirely depends his right of recovery.

It is a primary and fundamental rule concerning contracts,



that their construction must be according to the intention of the parties; and so paramount is this rule, that to such intention even technical words must give way: *Porter v. Shephard*, 6 T. R. 668; *Campbell v. Jones*, 6 Id. 570; *Norton v. Lamb*, 7 Id. 125; 1 W. Saund. 320 n.; *Gasly v. Price*, 18 Johns. 267. When the inquiry is in relation to their dependence or independence, this is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the covenants, their precedency must depend on the order of time in which the intent of the transaction requires their performance: *Jones v. Berkley*, Doug. 684. If the language of a contract will admit of it, justice and general convenience incline to the construction of a simultaneous performance; but if a man will agree to pay his money before he has the thing for which he ought to pay it, and will rely upon his remedy, this is a law of his own making, and his agreement he ought to perform. On the other hand, courts should carefully endeavor to avoid compelling a person to give credit when he did not intend it: *Thorpe v. Thorpe*, 1 Ld. Raym. 666.

To investigate the intention of parties to a contract, certain auxiliary rules have been established. It was laid down by Lord Holt, in *Thorpe v. Thorpe*, 1 Ld. Raym. 665, and since has been uniformly recognized, that if a day be appointed for payment of money and the day must happen, or may happen before the consideration of the money is to be performed, an action lies for the money before performance. The reason has already been assigned; it is, that the party relied on his remedy, and did not intend the performance to be a condition precedent: 1 W. Saund. 320, v.; 1 Chit. Pl. 313. This rule undoubtedly authorizes the plaintiff's recovery to the extent of the two first installments in the covenant sued on; or in other words, it thus far sanctions the judgment of the court below.

I am perfectly aware that the rule adopted in Westminster Hall is broader than the one before mentioned; but it was not adopted until the case of *Terry v. Duntse*, 2 H. Bl. 389, adjudged in the year 1795. In this case it was said to have been long established in the construction of covenants, that if any money is to be paid before the consideration is to be performed, the covenants are mutual and independent. Since the determination of the case alluded to it has been followed in Westminster Hall; and for a time it was recognized as evidence of the law in the neighboring state of New York: 1 W. Saund. 320, a.; 1 Chit. Pl. 313; *Seers v. Fowler*, 2 Johns. 272; *Haves v. Bush*,

2 Id. 387. But in the case of *Cunningham v. Morrell*, 10 Johns. 203 [6 Am. Dec. 332], the supreme court in the state last mentioned considered the case of *Terry v. Duntze* as a departure from principle; and the cases decided on the strength of it were overruled.

To the case of *Terry v. Duntze* there exists two incontrovertible objections. In the first place the cases relied on by the court furnish no sanction to the rule there adopted. They merely decide that where the entire consideration is payable at a time prefixed, which either must or may precede the consideration on the other side, there may be a recovery without performance: *Thorpe v. Thorpe*, 1 Ld. Raym. 662; *Ughtred's case*, 7 Co. 74, b.; *Pordage v. Cole*, 1 Saund. 319. It requires no acuteness to discern that if A. covenants to pay B. a sum of money on the first of April, and B. on his part agrees, in consideration of the said stipulation, to convey to A. a tract of land on the first of May succeeding, the money was intended to be paid before performance of the consideration. If, however, only a part of the money was to be paid before the conveyance of the land, and the residue afterwards, there is no exhibition of an intent that the whole consideration might be demanded before performance on the other side, but of the contrary. And this is the second objection against the determination I have been considering. The intention of the parties is contravened by a rule entirely artificial and in disregard of language the most definite and perspicuous, making instead of enforcing a contract. It will be seen on recurrence to the case of *Terry v. Duntze*, that by the aid of this novel principle the plaintiff recovered in defiance of the plain intention and agreement of the parties.

In *Cunningham v. Morrell*, before cited, upon the principle that "one's bargain is to be performed according as he makes it," it was decided that a covenant may in part be mutual and independent, and in part dependent, or on mutual conditions. "The parties," said Kent, C. J., "have a right to mould their contracts so as to suit their mutual convenience and interest; and when the courts can ascertain their meaning, they are so to construe the contract as to give effect to that meaning, provided the purpose be lawful." It results as a necessary consequence that the covenant of the defendants to pay the two first installments does not imply, that without performance they of course are bound to advance the entire consideration of their contract and rely on their remedy.

The terms of the agreement do not show it to have been the intention of the parties to make their contract mutual and independent. The covenant to pay the plaintiff "therefor" refers not to the agreement on the plaintiff's part, but to his performance by the execution of the stipulated deed. From the expression in the covenant that the plaintiff had bargained and sold, and "by these presents doth bargain and sell," we are not authorized to assume that the deed of covenant, the only one that was executed, conveyed the land in question. We do not judicially know what the law of Pennsylvania is. It must be alleged and proved like every other fact: *Hebron v. Marlborough*, 2 Conn. 18; *Mostyn v. Fabrigas*, Cowp. 174; Phil. Ev. 301, *notis*. And if the land was conveyed by the articles of agreement, the plaintiff has not assumed this ground in his declaration, and instead of recovering on the covenant throughout, he must totally fail, by reason of the variance between the covenant and the facts averred.

It is an established rule, requiring perhaps some modification, that where the plaintiff's stipulation constitutes only a part of the consideration of the defendant's contract, and the defendant has actually received a partial benefit, and the breach of the plaintiff may be compensated in damages, an action may be maintained by the plaintiff without averring performance: 1 Chit. Pl. 313; 1 W. Saund. 320, b.; *Boone v. Eyre*, 1 H. Bl. 273; *St. Albans v. Shore*, 2 Id. 279; *Campbell v. Jones*, 6 T. R. 573. The reason assigned is, that when a party has received part of the consideration for his agreement, it would be unjust because he has not had the whole that he should enjoy the part received without any compensation. But to render this rule available, the plaintiff must have averred in his declaration, performance of at least a part of that which had received a partial benefit: 1 W. Saund. 320, c.; 1 Chit. Pl. 314. Now the plaintiff has made no such averment, but by necessary implication from his declaration, the contrary is apparent, and the defendants have had no call on them to dispute the above fact. The court, in the face of the plaintiff's declaration, and without averment or hearing, cannot assume an important and uncontrovertible fact in his favor.

Having removed out of the way the propositions principally relied on in the arguments, I will refer to two established rules decisive of the case before us. The first of them is, that when two acts are to be done simultaneously, as where A. covenants to convey an estate to B., and in consideration thereof, B. cove-

nants to pay A. a sum of money on the same day, neither can maintain an action without showing performance, or an offer to perform, on his part: 1 W. Saund. 320, c.; 1 Chit. Pl. 114, and the cases there cited. On this established rule, neither party is obliged to perform the first act, but until such performance, there exists no claim by one against the other.

The application of this principle to the third installment in the covenant is obvious, and, in my judgment, conclusive. The plaintiff covenanted on or before the first of June, 1817, "to confirm unto the defendants the said undivided two thirds parts of the described land, by deed in fee-simple." On the other hand, the defendants contracted, on the same day, to pay the plaintiff five hundred dollars, and at the execution of said deed to secure the sums remaining due, by bond and mortgage of the premises. These are mutual conditions, and until performance, or an offer to perform on the part of the plaintiff, he had no claim to the correspondent consideration on the part of the defendant. This result is confirmed, if confirmation were needed, by the nature of the stipulations. The defendants were to be invested with the title to the land purchased, as well to compensate them for their previous advancements, as to enable them to give security for the payments to become due at a future period: *Green v. Reynolds*, 2 Johns. 206; *West v. Emmons*, 5 Id. 179; *Gasley v. Price*, 16 Id. 267.

When a day is appointed for the payment of money, and this is to happen after the performance of that which is the consideration of it, no action for the money can be maintained before the performance: *Thorpe v. Thorpe*, 12 Mod. 462; 1 W. Saund. 320, b.; 1 Chit. Pl. 313. This rule is applicable to all the installments subsequent to the third, which I have already disposed of. The payments are all of them to be made posterior to the execution of the plaintiff's deed confirming the title to the land in question. The plaintiff's performance of consequence was a condition precedent to their execution.

The penalty subjoined to the articles of agreement, and entirely collateral to it, was designed to secure their performance, and is in no respect indicative of the parties' intention. To recover this penalty, the plaintiff has brought an action of debt; to entitle himself to which he must show that he has "punctually, exactly, and literally fulfilled his part of the contract:" 1 H. Bl. 279. This, in my opinion, he has utterly failed to do.

PETERS AND BRAINARD, JJ., were of the same opinion.

CHAPMAN, J., was of opinion that the covenants to pay all the installments were independent. And with him concurred  
BRISTOL, J

New trial not to be granted.

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## ATWATER v. TOWNSEND.

[4 Conn. 47.]

**LEX FORI, WHEN GOVERNS.**—In an action for breach of contract, the remedy is to be governed by the *lex fori*. Accordingly, neither the statute of limitations nor a discharge under the insolvent laws of one state, is available as a defense to the action brought in another state.

**ASSUMPSIT** against Townsend as acceptor of a bill of exchange drawn in November, 1810, in New Haven, by the plaintiff's intestate, on the defendant, a resident of New York, and accepted by him there. The bill was protested for non-payment, and paid by the plaintiff's intestate. Subsequently to the dishonor of the bill, defendant received a discharge under the bankrupt laws of New York. By the statute of limitations of New York, an action on the bill would have been barred in that state. The defendant claimed that plaintiff could not recover. But a verdict was directed for the plaintiff and found accordingly.

*Daggett and Staples*, in support of the motion.

*B. S. Baldwin, contra.*

HOSMER, C. J. In *Medbury v. Hopkins*, 3 Conn. 472, it was determined by this court, that although in the construction of a contract, reference must be had to the place where it was made, yet with regard to the remedy upon it, that must be governed by the laws of the state where it is sought. On this principle, the statute of limitations of the state of New York was adjudged to be of no avail, and in the point of determination, that case was precisely like the one before the court. The question has often been decided, and must be considered as at rest: *Pearsall v. Dwight*, 2 Mass. 84 [3 Am. Dec. 35]; *Smith v. Spinolla*, 2 Johns. 196; *Sicard v. Whale*, 11 Id. 194.

The other point raised in the case was determined in *Woodbridge v. Wright*, 3 Conn. 523, and execution must issue in common form.

The other judges were of the same opinion except BRAINARD, J., who being absent gave no opinion.

New trial denied.

## PATTERSON v. LEAVITT.

[4 Conn. 50.]

**ARBITRATORS MUST UNITE.**—An authority given for a private purpose to a number of persons is joint, and must be strictly pursued. Accordingly, on a submission of matters to the arbitration and award of three persons, for private causes, all the arbitrators must concur in the award.

**SUBMISSION FOR PUBLIC PURPOSE.**—The rule is different, however, where the submission is of a public nature. In such case, the power may be considered joint and several, and a majority may perform the act delegated.

ACTION on a promissory note given by the defendant as an escrow to certain arbitrators, by them to be indorsed down to the sum they should award to be due from the defendant to the plaintiff on certain matters in controversy between the parties, submitted for arbitration. Two of the arbitrators indorsed the note to the amount sued for in this case, but the third arbitrator expressly dissented from the award.

The case was submitted by agreement.

*Strong*, for the plaintiff.

*N. Smith and Ingersoll, contra.*

HOSMER, C. J. The sole question in this case is, whether an award made by two only of three arbitrators, no such power having been expressly given, and the other having dissented, is legally valid.

The principles applicable to this case are indisputably settled, and the only inquiry relates to their application. It is said by Lord Coke, Co. Lit. 181, b., that there is a diversity between the authorities created by the party for private causes, and an authority created by law for the administration of justice; as, if a man devise that his two executors shall sell, or a charter of feoffment be made to deliver seisin, they must concur. But if the sheriff, on a *capias* directed to him, make a warrant to four or three jointly or severally to arrest, two may make the arrest, because it is for the execution of justice, which is *pro bono publico*, and therefore shall be more favorably expounded.

It is established beyond a question, that an authority given for a private purpose to a number of individuals is joint, and must be strictly pursued: 3 Vin. Ab. 421; Pow. Dev. 294; *Guppy v. Brown*, 4 Dall. 410. On the other hand, if a power be of a public nature, the majority may perform the act delegated; the power being considered as joint or several: *Grindley v. Barker*,

1 Bos. & P. 229; *The King v. Beeston*, 8 T. R. 592; *Withnell v. Gartham*, 6 Id. 388. A submission to arbitration in Westminster Hall, as well as in the adjoining states of New York and Massachusetts, has been uniformly considered to be a delegation of power for a mere private purpose, and all the arbitrators must concur, unless it is otherwise provided by the parties: *Sallons v. Girling*, Cro. Jac. 277; *Berry v. Penring*, Id. 399; *Dalling v. Matchett*, Willes, 215; S. C., Barnes' Notes; Kyd on Awards, 106; *Green v. Miller*, 6 Johns. 39 [5 Am. Dec. 184]; *Tbone v. Jaquith*, 6 Mass. 46 [4 Am. Dec. 84]. The correctness of these decisions is evidenced by the common practice of authorizing a number of the arbitrators, less than the whole, to make a valid award, if the parties elect to confer this authority. Nor do I know that any determination has ever been made, establishing an award made by a part of the arbitrators, unless the power was specifically given.

It has been contended that the law of Connecticut has been otherwise established; but of this no evidence appears except the *dictum* in the second volume of Swift's System, p. 8, for which no authority is cited, and to which, in opposition as it is to all the cases, I cannot defer. I think it not improbable that from a supposed analogy to the awards of referees and auditors, who derive their power to administer justice by the act of law, the awards of arbitrators have often been considered, not only by the courts, but by individuals, as resting on the same ground. A mistake so obvious, had this consideration, and the practice in consequence of it, been more general than they have been, could only warrant a prompt correction of the error, and not a confirmation of it. The construction which I have adopted, can result in no possible inconvenience. It assumes the principle that a general delegation of authority for a private purpose is intended to be strictly expounded, and that such is a submission to arbitration. But the parties submitting may confer a special authority, authorizing a valid determination by any member of the arbitrators.

I would advise that judgment be rendered for the defendant.

The other judges were of the same opinion, except BRAINARD, J., who was absent.

Judgment for the defendant.

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This subject is discussed in a note to *Moore v. Fving*, 1 Am. Dec. 195.

## DAGGETT v. STATE.

[4 Conn. 60.]

**CONSTRUCTION OF PENAL STATUTES.**—Penal statutes are to be expounded strictly against an offender and liberally in his favor; it is not sufficient that the offense is within the mischiefs intended by the legislature to be redressed, if not within the words used. Accordingly, it is not punishable, under the statute prohibiting the erection of wooden buildings within certain limits, and of wooden additions to buildings already erected, having in them a chimney, fire-place, or stove, to make a wooden addition to a building, with a fire-place entirely without the addition.

**INFORMATION** before the county for a violation of the act prohibiting the erection of wooden buildings within certain limits, or of wooden additions to buildings already erected having in them a chimney, fire-place, or stove. It appeared that the defendant made a wooden addition to a building already erected, which with a portion of the old building made an apartment thirteen feet long and eleven feet wide; that the defendant erected a chimney and fire-place in that part of the apartment which consisted of the old building, and opening into the apartment, and fitted up for its use and accommodation, though not extending in any point as far as the line of the addition.

The jury were instructed to find a verdict of guilty, which was done. The defendant then brought this writ of error.

*Daggett and Denison*, for the plaintiff in error.

*N. Smith and Ingersoll*, contra.

**HOSMER, C. J.** The rule has long been established that penal statutes must be construed strictly: *Beniger v. Fogossa*, 2 Plowd. 17; *Cone v. Bowles*, 1 Salk. 205; 1 Bl. Com. 88. More correctly it may be said, that such laws are to be expounded strictly against an offender and liberally in his favor. This can only be accomplished by giving to them a literal construction, so far as they operate penally, or at most, by deducing the intention of the legislature from the words of the act: *Heydon's case*, 3 Co. 7; *The King v. Gage*, 3 Mod. 64. In extension of the letter of the law, nothing may be assumed by implication, nor may the mischief intended to be prevented or redressed, as against the offender, be regarded in its construction. It was the object of the principle to establish a certain rule, by conformity to which mankind should be safe, and the discretion of the judge limited. How much this must contribute to the security and



enjoyment of the citizen, is too palpably obvious to require illustration.

Upon the before mentioned principle, it has been adjudged, that an act made to punish the person who stole a cow, is not applicable to him who steals a heifer: *Richard Cooke's case*, Leach's C. L. 109, and a law prohibiting the transportation of provisions in any wagon or otherwise, to any enemy, is not infringed by driving fat oxen on the leg: *The United States v. Sheldon*, 2 Wheat. 119. That the mischiefs at which these laws were aimed, existed in both the cases alluded to, is past a question, but the acts prosecuted, not being within the words of the legislature, were considered as not within the prohibition of the laws. I will only add, that the moment the strict construction of penal laws is abandoned, the difference between their interpretation and that of remedial laws must terminate, as there is no middle ground between them.

The act on which the prosecution of the defendant is founded, prohibits the erection of wooden buildings within certain limits, and of all wooden additions to buildings already erected, having in them a chimney, fire-place, or stove. The addition to the building of the defendant, already erected, had not a chimney, fire-place, or stove within it, but the chimney was without the addition, although made for its accommodation. The words of the statute according to their right comprehensive meaning have not been violated, and nothing short of a liberal construction of the act as if it were a remedial law can subject the defendant. Had the legislature anticipated the case before the court, it is not improbable, that they would have employed expressions prohibitory of the act which is prosecuted. Such expressions, however, do not exist; and the statute, therefore, has not been violated.

I would advise a reversal of the judgment.

The other judges were of the same opinion, except BRAINARD, J., who was absent.

Judgment to be reversed.

## TRACY v. WILLIAMS.

[4 Conn. 107.]

**TRESPASS AGAINST JUDGE.**—If a justice of the peace before whom an offender against the riot act, arrested on view, is brought, make an order, without a previous complaint in writing, requiring the offender to be bound over for trial, and on his refusal to comply with such order, commit him to prison, such justice, having exceeded his jurisdiction, will be liable in trespass for false imprisonment.

**TRESPASS** for false imprisonment against a justice of the peace. It appeared that the defendant Williams, as justice, had ordered a large number of persons assembled together unlawfully in the public street, with intent to do unlawful acts, to disperse, but that Tracy and seven others refusing to do so, they were apprehended and brought before Williams, who then ordered the eight persons to give bonds for their appearance before the county court, and in default thereof were imprisoned until they should be discharged by order of law. This was the imprisonment complained of.

Pursuant to instructions the jury found for the plaintiff with one dollar damages. Motion for a new trial.

*Cleaveland and Brainard* for the motion.

*Goddard and Garley, contra.*

**HOSMER, C. J.** This case presents to the court two questions for determination: 1. Whether by virtue of the statute concerning riots, a justice of the peace is authorized on his own personal view, to arrest the offenders against that law, and without written complaint or warrant, to fine, imprison, or bind them over to a superior tribunal; 2. Whether if he does this he is liable in trespass.

[After an examination of the statute, which led to the opinion that the defendant herein exceeded his jurisdiction in issuing a warrant for the arrest of the plaintiff, the chief justice continued]:

2. Whether the defendant is suable in trespass is the remaining consideration. For error in opinion however palpable and flagrant, no justice or judge is responsible in trespass, if the record shows that he had jurisdiction and proceeded regularly. But if he has not jurisdiction over the person and process, and subject-matter, his acts in the assumed capacity of a judge are void. In the case supposed he is not a judge; and the authority exercised by him perhaps with the best motives, is nothing

better than mere usurpation. From the *Marshalsea case*, 10 Co. 76, b., to the present time, these principles have remained unquestionable. It is said in *Perkins v. Proctor*, 2 Wils. 384: "Where courts of justice assume a jurisdiction which they have not, an action of trespass lies against the officer who executes the process, because the whole proceeding was *coram non iudice*; where there is no jurisdiction there is no judge, the proceeding is nothing."

The point is too clear and familiar to require further discussion: See *Smith v. Boucher*, 2 Str. 993; *Grumon v. Raymond*, 1 Conn. 40 [6 Am. Dec. 200]; *Slocum v. Wheeler*, 1 Id. 429. The case most parallel with the one before us is that of *Morgan v. Hughes*, 2 T. B. 225: A justice of the peace granted a warrant without any information, upon a supposed charge of felony; and in favor of the person imprisoned under it, an action of trespass against the justice was adjudged to be the legal remedy. It was said by Ashurst, J.: "When a person is committed to prison by the warrant of a justice, without any accusation, some person is guilty of false imprisonment, and it must be the imprisonment of the justice, who is the immediate and not the remote cause of it."

The imprisonment of the plaintiff was undoubtedly illegal; and the defendant, although I have no doubt he acted from the purest motives, had no right to issue a warrant of commitment against him. He, therefore, in this respect was a trespasser; and the plaintiff's action is rightly conceived. The other judges were of the same opinion.

New trial not to be granted.

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See note to *Yates v. Lansing*, 6 Am. Dec. 290.

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## PEABODY v. HARVEY.

[4 Conn. 119.]

**PAROL GUARANTY BY INDORSER.**—Where the defendant after he had been discharged from his liability on a promissory note, by the laches of the plaintiff, the holder, promised the plaintiff by parol, to pay the note if he would forbear to sue the maker, such promise was held void within the statute of frauds.

**NAKED POWER REVOCABLE.**—Where the defendant, who receives for collection a note in favor of the plaintiff's debtor, the proceeds of which the debtor directed to be paid to his creditors, promised the plaintiff in consideration of his forbearing to sue the debtor, to pay the proceeds to

him, it was held that the power given to the defendant was revocable, and that he was not liable in action for money had and received, it appearing that before the note had been collected, the debtor directed the defendant to pay the sum when collected to a particular creditor, which the defendant did.

**ASSUMPSIT.** The opinion states the case. Verdict for the defendant. Motion for new trial.

*Cleveland*, in support of the motion.

*Goddard and C. Perkins, contra.*

**HOSMER, C. J.** In the first count of the declaration it is averred, that in consideration that the plaintiff would forbear, and give day of payment to one Bushnell, for a reasonable time, the defendant would pay to him the sum, in which Bushnell was indebted. And in the second count there are the same allegations, with this difference only, that instead of a promise to pay, the allegation is of a promise to guarantee the payment.

To prove these allegations, the plaintiff adduced in evidence a note given by Bushnell, to one Huntington, and by him assigned to the plaintiff, with the defendant's indorsement thereon, but from which by the plaintiff's laches, the obligation of the defendant as indorser, had become extinguished, and another note, executed by Bushnell to the plaintiff, to which the defendant never was a party. Superadded to this the plaintiff exhibited parol evidence, by which he claims to have proved the promises by him alleged. These promises for the debt of another person not being in writing, are undoubtedly within the statute of frauds and perjuries: *King v. Wilson*, 2 Str. 873; Bull. N. P. 281; *Fish v. Hutchinson*, 2 Wils. 94; 1 Saund. 211, a.; *Sears v. Brink*, 3 Johns. 211 [8 Am. Dec. 475]. A promise on a new consideration rests on different principles, and has never been sustained on the forbearance of a demand against a debtor.

It has been insisted that a parol promise subsequent may be attached to a precedent indorsement, and the contract be considered to be in writing, but this is merely a fiction, a creature of the imagination only. A verbal promise, by an ingenious subtlety of this sort, cannot be invested with a new nature; it remains a verbal promise still, and is equally embraced by the letter and spirit of the statute of frauds and perjuries. It is too late to bring back to correct principles the construction of this beneficial law, with which indefensible liberties have been taken, at least, so far as the exposition of it has been established, but not being of the opinion that it is meritorious to evade it, by

refined devices, I shall anxiously resist every novelty which tends to undermine it.

The third count in the plaintiff's declaration is for money had and received, by the defendant to his use, of one Leverett Bissell. To sustain this count the plaintiff claimed to have proved, that the defendant had in possession a promissory note given by Bissell to one Bushnell, which Bushnell had directed him to collect and pay to his creditors, after which, on the consideration expressed in the declaration, the defendant promised to pay the money, when collected, to the plaintiff. By way of defense for the non-performance of this promise, the defendant claimed to have proved, that before the money was collected of Bissell, he was commanded by Bushnell to make payment of it to one Hyde, which accordingly he had done. It has not been disputed, that an action against the defendant is sustainable on his express promise, and this, in my opinion, is the plaintiff's only remedy. Had there been no revocation, by Bushnell of the authority originally given, when the money was collected of Bissell, the defendant would have held it in trust for Bushnell's creditors. It was not in the defendant's power, by his contract, to confer on the plaintiff a specific right to the money in question, as it was not his either to enjoy or dispose of, and without this specific claim, the action for money had and received cannot be supported.

The authority given by Bushnell, was unquestionably revocable; and having been actually revoked, when the money came into the defendant's hands, it was the money of Bushnell. That such authority had been given appears not to have been known by Bushnell's creditors; and on their part there was neither consideration nor assent; nor were they under any obligation to suspend their demands, or receive the money. The power imparted by Bushnell to the defendant was naked, without interest and therefore revocable. Had the power been coupled with an interest, it would have been irrevocable. These principles are familiar and too well established to be the subject of controversy. Butler's note to Co. Lit. 342, b.; *Bergen v. Bennett*, 1 Cai. Cas. 115 [2 Am. Dec. 281]; *Jackson v. Davenport*, 18 Johns. 295. If a bill had been drawn by Bushnell on the defendant in favor of his creditors, for value received, in which he had directed the defendant to pay the money to them when collected, and the defendant had accepted it, it would have amounted to an equitable assignment of the property: *Powel v. Gordon*, 2 Esp. 735; *Green v. Scott*, 1 Ves.

jun. 282; *Row v. Dawson*, 1 Ves. 331; *Peyton v. Hallett*, 1 Cai. 364; *McMenomy v. Ferrers*, 3 Johns. 72. But a mere gratuitous direction to an agent to collect and pay a sum of money, is no equitable assignment of the property, nor an authority coupled with an interest; but is a purpose just as revocable as if the principal had formed a similar determination for the regulation of his own conduct. *Quacunque via data*, then the plaintiff had no claim on the money collected of Bissell.

PETERS, CHAPMAN AND BRAINARD, JJ., concurred.

BRISTOL, J., thought that the power given by Bushnell to the defendant to pay over the money to the plaintiff, could not be countermanded so as to defeat the plaintiff's right. In other respects, he concurred in the opinion delivered by the chief justice.

New trial not to be granted.

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In *Mansfield v. Mansfield*, 6 Conn. 564, the court cited this case showing when a naked power is revocable. As to the promise in this case being within the Statute of Frauds, see Brown on Statute of Frauds, 154, 190.

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## PETTIBONE v. GRISWOLD.

[4 Conn. 158.]

**NATURE OF CONDITION IN MORTGAGE.**—The condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. Accordingly, where the condition of a mortgage deed was that the mortgagor should pay all notes which the mortgagee might indorse or give for the mortgagor, and all the receipts which the mortgagee might hold against the mortgagor, such mortgage was held void, as against the creditors of the mortgagor.

**BILL** in equity to foreclose the equity of redemption of the defendants in certain premises mortgaged by them to the plaintiff's testator, Thadeus Pettibone. The mortgage was conditioned for the payment of four thousand dollars in six months, at Hartford bank, "and all other notes the said grantee might indorse or give for said Griswold, at the bank or elsewhere, all receipts said Pettibone, deceased, might hold against the said Griswold," etc. It appeared that Pettibone held certain receipts of the defendant Griswold for notes given to Seth and Elijah Cowles before the mortgage. The bill alleged that certain creditors of Griswold had levied executions on the premises in question, and that Griswold was bankrupt.

The case was submitted on a demurrer to the bill.

*Hoggett and T. S. Williams, for the plaintiff.*

*W. W. Ellsworth, contra.*

HOSMER, C. J. The plaintiff has brought his bill to foreclose a mortgage, the condition of which is, to secure to the mortgagee the payment of a note accurately described, which it is presumed has been paid, as there is no allegation of non-payment; and likewise to secure "all other notes the said grantee might indorse for or give for the said Griswold, at the bank or elsewhere, and all receipts said Pettibone, deceased, might hold against said Griswold." The land mortgaged has been levied on by execution against the mortgagor; and the controversy is between the mortgagee and the execution creditors.

The notes of hand given to Seth Cowles and Elijah Cowles & Co., were in existence at the date of the mortgage, and were not included in the condition. They might and ought to have been described or embraced by some intelligible description of them. But the expression "all notes the said grantee might indorse for or give for said Griswold," manifestly refers to future contracts, and not to notes then existing. The receipt of the nineteenth of September, 1815, renders it necessary to proceed further in the discussion of this case, or the preceding observations would be conclusive on the whole controversy.

On the extent to which a mortgage may be taken, I shall not express a definite opinion, as the exigencies of the case do not require it. It may undoubtedly be for existing debts, existing liabilities, and perhaps for debts to be contracted in the future. But the manner in which it may be done forms an important consideration. It is the policy of our laws, and experience has demonstrated the wisdom of it, that the titles to real estate should be registered for the benefit, not of the parties, but of the creditors, and all others interested. "All grants and mortgages of houses and lands shall be recorded at length by the town clerk, and no deed shall be accounted good and effectual to hold such houses and lands against any other person or persons, but the grantor or grantors, and their heirs only, unless recorded as aforesaid:" Stat. 302, sec. 9. It is the object of this law to prevent fraud, and give security and stability to title. It results unquestionably that the condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make inquiry *in pais* concerning the liens on the property of his debtor; but on application to the record he may acquire all the information

which his interest demands. At least, he must have the power of knowing from this source the subject-matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors.

The condition of the deed under discussion is dangerously indefinite; and is at war with the policy of the recording system. It embraces all future notes and receipts, without the designation of any; and baffles the inquiry of creditors and others, relative to the condition of the mortgaged estate. A condition to a deed made to secure all future supplies, debts and liabilities, of every possible nature and description, would not be more lax and indefinite. The creditor could know nothing from an examination of the record, and must be cast on his debtor for information, the very person who would be least inclined to give it; and successive obligations, fictitious or actual, might be made, to lock up his land, in defiance of every claim against him.

I am well aware that absolute certainty is not always to be expected from an examination of the records of land titles; but there always may and ought to be a certain object after which suitable inquiries may be made. A mortgage may be given to indemnify a person from damages arising by reason of his having become the surety of another, in the office of sheriff or collector, or as administrator on an estate. In all these cases an inquiring creditor cannot know from the town record the precise incumbrance; but he has notice of certain definite facts, which point to and guide him in the necessary investigation on the subject. Cases of this description must not be confounded with conditions to deeds, which neither communicate any certain information, nor designate any tract in pursuance of which information may be obtained.

The other judges were of the same opinion.

Judgment to be entered for defendants.

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In *McDaniels v. Colvin*, 16 Vt. 300, it is held that a mortgage deed for the payment of future accruing accounts which may become due from the mortgagor to the mortgagee, is not void as between the parties, nor as to subsequent purchasers. Referring to the principal case the court say: "This case does not appear to have been decided on a full examination of the authorities. The judge who delivered the opinion indulged in some remarks



and made some observations well expressed and creditable to him as a scholar and writer, but which proved very inconvenient in the investigation of after cases; and it is apparent that the court in the cases where this subject came before them afterwards, while endeavoring to preserve the authority of that case, have disregarded it so far as the learned judge treats these mortgages for subsequent advantages as 'dangerously indefinite, and at war with the policy of the recording system.'" Again, in *Seymour v. Darrow*, 31 Vt. 122, the court say that the principal case is not now regarded as law in Connecticut; and all that is now required there is that the debt should be described with such convenient certainty as the case admits of. And reference is made to *Stoughton v. Pasco*, 5 Conn. 442; *Hart v. Chalker*, 14 Id. 79; *Merrill v. Swift*, 18 Id. 257; *Sandford v. Wheeler*, 13 Id. 165; *Lewes v. De Forest*, 20 Id. 427; *Mix v. Cowles*, Id. 420.

Is it true that the doctrine of the principal case is overruled in Connecticut? The most recent reference to the case is in *Bramhall v. Flood*, 41 Conn. 68, decided in 1874; and it will be seen that the court unqualifiedly affirms and follows the case. There a mortgage described the debt as a note of one thousand dollars. No such note had ever been given, but the mortgagor was indebted to the mortgagee for goods sold to the amount of seven hundred and fifty-six dollars, and the latter agreed to furnish additional goods up to the sum of one thousand dollars, and the mortgagor had offered to give him security for the whole, and made the mortgage with that view. It was held that the mortgage was void against a subsequent attaching creditor. The court refers to the principal case as their leading case saying: "This case is the leading one in this state regarding the requisite certainty in the description of a mortgage debt. It has been followed by the cases of *Shepard v. Shepard*, 6 Conn. 37; *Stoughton v. Pasco*, 5 Id. 442; *Hubbard v. Savage*, 8 Id. 215; *Booth v. Barnum*, 9 Id. 286; *Sandford v. Wheeler*, 13 Id. 165; *North v. Belden*, Id. 376; *Hart v. Chalker*, 14 Id. 79, and many others which it is unnecessary to mention." This is a good illustration showing how careful courts ought to refer to cases as being overruled elsewhere.

There is unquestionably much diversity of opinion as to whether mortgages to secure future advances are invalid against creditors and subsequent incumbrancers. A recent author fully examines this subject. As a conclusion he states that in this country mortgages made in good faith for the purpose of securing future debts have generally been sustained both in the early and in the recent cases: 1 Jones on Mortgages, sec. 365. In support of this reference is made to *Commercial Bank v. Cunningham*, 24 Peck; *Goddard v. Sawyer*, 9 Allen, 78; *Truscott v. King*, 6 N. Y. 147; *James v. Morey*, 2 Cow. 292; *Briinkerhoff v. Lansing*, 4 Johns. Ch. 73 [8 Am. Dec. 538]; *Fassett v. Smith*, 23 N. Y. 252; *Brackett v. Sears*, 15 Mich. 244; *Seaman v. Fleming*, 7 Rich. Eq. 283; *Garber v. Henry*, 6 Watts, 57. In addition we cite the Vermont cases above; and *Witekinski v. Everman*, 51 Miss. 841.

## READ v. CASE.

[4 Conn. 168.]

**BAIL'S RIGHT TO ARREST PRINCIPAL.**—The bail may arrest the principal when and where he pleases, and if necessary may break open the doors of the principal's house, if he refuses to surrender himself after notice.

**IDEM—BREAKING IN TO ARREST.**—If the personal safety of the bail is threatened by the principal if attempt to arrest him be made, the bail may break open the doors without notice of his coming having been given.

**UNLAWFUL ARREST OF PRINCIPAL.**—If a bail break and enter the principal's house in a manner not authorized by law, in an action of trespass therefor, recovery is restricted to the actual damages sustained.

**TRESPASS** for breaking and entering the plaintiff's house, striking him, imprisoning him, etc. It appeared that the defendant and another were bail for the plaintiff in a certain action; that on the day of the alleged trespass, a deputy sheriff had proposed to plaintiff to give himself up; that plaintiff said he should not, that his house was his castle, that he had a gun and should protect himself; that defendant swore out a *millimus* against the plaintiff, and delivered the same to the deputy; that on the day of the alleged trespass, the defendant, after assuring the plaintiff on his honor that he had nothing against him, and would not let any one in, was admitted by the plaintiff into his house, the outer doors of which were closed; that in the evening a rap was heard on the door, whereupon defendant seized plaintiff's gun and struck him with it, and then suddenly opened the door where stood the deputy, who, without giving notice of his business, arrested the plaintiff, and then made known the cause of his coming by reading the *millimus*.

PETERS, J., before whom the cause was tried, charged the jury among other things: If, then, you are satisfied the defendant entered the plaintiff's house by fraud, and opened it by force, and let in the deputy sheriff, and assisted him in arresting and imprisoning the plaintiff, without first making known his authority and the occasion of his coming, your verdict will be for the plaintiff to recover such damages as you think reasonable; otherwise your verdict will be for the defendant."

Verdict for the plaintiff, and motion for a new trial, on the ground of misdirection.

*N. Smith and Phelps*, in support of the motion. As against the bail, the principal has no castle: *Anon*, 6 Mod. 231; *Ex parte Gibbons*, 1 Atk. 238; *Sheers v. Brooks*, 2 H. Bl. 120; *Parker v. Bidwell*, 3 Conn. 84; *Nicholls v. Ingersoll*, 7 Johns. 145.

*T. S. Williams, contra.* If the break was unlawful, there could be no right to arrest and imprison.

HOMER, C. J. The right of the bail over his principal, whether exercised personally or by delegation, is too well established to require any observation. I will barely remark that the law supposes the principal to be always in the custody of his bail; and if he is not in fact the bail may take him when and where he pleases. If the principal has withdrawn himself within his own house and fastened his doors, the bail may break them open to arrest him after having signified the cause of his coming and requesting the principal to open them. Although this is the general rule and established on principles of wise policy, there are cases not within the reason of it, and which manifestly form a just and reasonable exception. The one displayed on the record is clearly of this description. The principal had resolved, if the defense made was true, in defiance of the obligations, both of justice and honor, to rescue himself from the custody he had voluntarily assumed and with full knowledge of the purpose for which he was sought after, to resist even to the shedding of blood. Under these circumstances he was not within the reason and spirit of the rule requiring notice; nor was the bail obliged by law to make a demand, that would probably issue in the destruction of life. I consider the defendant as an assistant to the bail and justifiable on the same reason.

The jury should have been informed that if the personal safety of the bail or his substitute was in hazard, the proceeding to apprehend the plaintiff was lawful. Imminent danger to human life, resulting from the threats and intended violence of the principal towards his bail, constitutes a case of high necessity, and it would be a palpable perversion of a sound rule to extend the benefit of it to a man who had full knowledge of the information he insists should have been communicated, and who waited only for a demand to wreak on his bail the most brutal and unhallowed vengeance. If the forms of law had been violated I could not subscribe to the direction given to the jury in relation to damages. The plaintiff ought to have been limited to the actual damage sustained. His imprisonment was lawful; for it was the condition which, in contemplation of law, he had been subjected to from the moment the bail was given; and of his damage the actual restraint of his person formed no part.

CHAPMAN, BRAINARD AND BRISTOL, JJ. were of the same opinion.

PETERS, J. was of opinion that a new trial should not be granted.

New trial to be granted.

## AMERICAN ASYLUM v. PHOENIX BANK.

[4 Conn. 172.]

**WHAT IS A CHARITABLE CORPORATION.**—A corporation having for its sole object the education and instruction of the deaf and dumb, supporting and instructing indigent persons of that class gratuitously, and receiving a pecuniary compensation from pupils able to make it; deriving its means of dispensing charity from the donations of individuals and of the public, and applying its funds exclusively to the general object of the institution, is a charitable corporation.

**MANDAMUS, WHEN DOES NOT LIE.**—A writ of *mandamus* never lies to restore to a private office, nor to execute a private right, nor where there is another specific remedy, nor where satisfaction equivalent to specific relief may be had in an action on the case.

**MANDAMUS A PROSPECTIVE REMEDY.**—The writ of *mandamus* is prospective merely, accordingly, where redress for the past privation of a right as well as restoration in future is sought, a bill in equity is the proper remedy.

**BILL in equity.** The case was submitted for the opinion of this court upon a statement of facts which appear from the opinion.

*N. Terry and T. S. Williams*, for the plaintiff.

*Gould and Mitchell, contra*, contended that equity would not decree a specific act to be done except upon a contract *inter partes*: *Rex v. Barker*, 3 Burr. 1265, 1267; *Sir James Smith's case*, 3 Mod. 53; *Rex v. Commissioners*, 1 T. R. 146, 148; *Rex v. Wyndham*, Cowp. 377; Com. Dig. tit. *Mandamus*, A.

**HOSMER, C. J.** In May, 1816, the general assembly of this state incorporated John Caldwell and others, by the name of the Connecticut asylum for the education of deaf and dumb persons, with the right of purchasing, receiving and holding estate, real and personal, the annual income of which should not exceed five thousand dollars. The funds of this incorporated company were created by donations from individuals, from religious societies, from the state of Connecticut and from the United States. It is averred in the plaintiff's bill, and the fact is admitted that the asylum, the name of which has been changed by legislative act to the American asylum, is an institution having for its sole object the education and instruction of the unfortunate who are deaf and dumb, and that the only means of doing this are derived from the charity of individuals and of the public. From the pupils instructed at the asylum, who were of ability to make payment for their education, money

had been received, and those who were not able have been supported and educated gratuitously. The disbursements on account of pupils have considerably exceeded the sums received of them, and the funds of the asylum have exclusively been applied to the general object of its institution.

The act incorporating the Phoenix bank provides, that the said bank shall at all times be open for subscriptions at the rate of one hundred dollars for each share from any school or corporation for charitable purposes within this state, and under a claim of right the plaintiffs have deposited with the president, directors and company of the said bank twenty thousand dollars, for the purpose of procuring two hundred shares of stock, but their subscription for stock has been refused. The bill of the plaintiffs prays, that the bank be compelled to receive their subscription, and pay the dividends to which they would have had title, had they been permitted to subscribe.

The defendants have presented two objections to the plaintiffs' bill: first, it is said they are not a school or corporation for charitable purposes; and, secondly, that there is adequate remedy at law.

The interesting and luminous decision of the supreme court of the United States, in the case of the trustees of *Dartmouth College v. Woodward*, 4 Wheat. 518, with which I entirely accord, and to which I shall have a silent reference in my opinion, only renders it necessary to state the grounds of it very briefly. Eleemosynary corporations or those created for charitable purposes, are such as are constituted for the perpetual distribution of the free alms of the founders of them, to such purposes as they have directed. Of this description are hospitals for the maintenance of the poor, sick or impotent, and colleges or schools for the promotion of piety and learning. The establishment of an institution for the dissemination of learning has always been considered a charity. The true test of an institution is its origin and objects. If it is founded on donations, and has for its purpose the accomplishment of a charity by the distribution of alms, it most unquestionably is eleemosynary.

The American asylum may, with the strictest propriety, be defined an incorporated school for charitable purposes. It is a school, which is a generic term denoting an institution for instruction or education; and from the nature of its object is a private incorporation. Its objects and operations are all of a private character; and the donations of states to aid in effectua-

ting them do not in the minutest degree change its nature. The institution is exclusively "for charitable purposes," its sole object being to pour instruction into the minds of the deaf and dumb; to elevate them from the lowest degradation of intellect to the dignity of intelligent, and fit them to become, moral and religious beings; to open their blind eyes, and unstop their deaf ears; and to accomplish this through the means of funds derived from the gratuities of the benevolent. A purpose so honorable and noble and free from the dross of self-interest, brings the American asylum peculiarly within the spirit, as it is obviously within the letter of the law, which authorizes a compulsory subscription of the stock of the Phoenix bank. The asylum in no sense of the expression, is a money-taking institution. All its funds are necessarily applicable to the charitable object of educating the deaf and dumb; and this is done gratuitously except so far as the power of doing is enlarged by the sums paid for instruction, by the rich and able. By this operation, the funds of the institution are not absorbed, but augmented; the charitable object of the asylum is not diminished, but promoted; and the nature of it is not changed, but pursued. The funds of the institution are not applicable to any but eleemosynary purposes, nor have they been otherwise applied. If they had it would have constituted a breach of trust for which there is a most obvious remedy. And as the trustees are alone authorized to act for the promotion of the benevolent object of the institution, so the donors are in no event entitled to any profit which might arise from the enlargement of its funds. Be they greater or less, they are consecrated to charity, and this decisively marks the eleemosynary character of the institution.

It has been contended by the defendants that the plaintiffs have adequate remedy at law by writ of *mandamus*. I think it very doubtful, to say no more, whether the supposed remedy has any existence. The writ of *mandamus* lies to enforce the execution of an act when otherwise justice would be obstructed; and regularly issues only in cases relating to the public and the government; hence it is called a prerogative writ: *Knipe v. Edwin*, 4 Mod. 281; March, 101. It never lies to restore to a private office, nor to execute a private right; and that the claim of the plaintiffs is founded on this ground only, there can be no question: *The King v. Churchwardens of Croydon*, 5 T. R. 713, 714; 4 Bac. Ab. 497, 504, 505, Gwil. ed. The refusal of the defendants to permit the plaintiffs to subscribe, is an infraction of

the private right of individuals, acting through the medium of an incorporation. A *mandamus* is never granted when a person has another specific remedy; or may bring an action on the case, which affords satisfaction equivalent to specific relief; and that case may be sustained against the defendants for the privation of the legal rights of the plaintiffs is beyond dispute. In *The King v. The Bank of England*, Doug. 500, it was decided that the court would not grant a *mandamus* to the bank for the transfer of stock, because there is a remedy by action on the case if they refuse; and the analogy between that case and the one under discussion is very striking. And, lastly, the remedy by *mandamus* is discretionary: 4 Bac. Ab. 515, Gwil. ed.

But if the above mentioned remedy might be had, it is not adequate, because it would not be complete. It would be merely prospective, and not reach the exigencies of the case. The relief on a bill in chancery at one stroke compels the defendants to permit the plaintiffs to subscribe and to pay the dividends, as if they had suffered the subscriptions to have been made at the time the plaintiffs requested it.

CHAPMAN, BRAINARD AND BRISTOL, JJ., concurred.

PETERS, J. being a stockholder in the Phoenix bank, gave no opinion.

Decree for the plaintiffs.

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## WELLES v. COWLES.

[4 Conn. 122.]

**DIVIDENDS CONSIDERED PERSONALTY.**—Dividends declared after the death of a stockholder in a turnpike company, of the tolls collected before the stockholder's decease, are personal estate and do not pass to the heir.

**EXECUTOR—RIGHT TO DAMAGES.**—Where damages are assessed by the county court in favor of the owner of land through which a public road had been laid out, to be paid when the road is opened, which event does not happen until after the owner's decease, it was held that such damages became a debt as soon as assessed, and passed to the executor.

**EXECUTOR'S RIGHT TO ACCRUED RENT.**—In case of the lessor's death before the expiration of a parol lease for a year, the heir cannot, in an action of *assumpsit*, recover the rent accruing prior to the decease, either on the ground of express contract, or on the ground of an implied contract for use and occupation.

**ASSUMPSIT** to recover of the defendant certain sums of money which he had received as executor of Sarah and Julia Norton,

deceased. The plaintiffs were heirs at law of the deceased, and claimed a dividend on certain stock in a turnpike company held by Julia Norton, which dividend was declared after her decease on the tolls accruing before that event. They also claimed a certain sum paid to defendant, as damages assessed by the county court on a public highway laid out over Julia's land, which road was laid out and damages assessed before her decease, but ordered not to be paid until the road was opened, which did not take place until after her decease. A certain other sum was also claimed for rent paid to defendant by certain tenants of Julia's land, leased by parol agreement for one year by the defendant, as guardian of Julia. Julia died before the expiration of the lease, and the rent paid was that accruing at that time.

Pursuant to instruction, the jury found for the defendant.

*T. S. Williams*, in support of the motion.

*Trumbull and A. Smith*, contra.

HOSMER, C. J. Julia Norton was the proprietor of a share of turnpike stock, a dividend on which was declared by the directors of the turnpike company, a few days after her death, to a period which was nine days before that event. The plaintiff, Welles, through his wife, who is heir to the deceased, claims the above product of the turnpike stock; and the defendant interposes his demand on the ground of his being her executor. The former considers the profits of the stock to have been real estate; while the latter insists it is personal.

That the shares of a turnpike company, before the act of the general assembly, passed at their May session, 1818, were real estate, was decided in the case of *Welles v. Cowles*, 2 Conn. 567; but the money received for toll is personal property. Tolls, when considered as synonymous with shares of a turnpike company, and indicating a right to collect money, are a tenement: Co. Lit. 19, b. 20; *The King v. Inhabitants of Bubwith*, 1 Mau. & Sel. 514; but when the toll is collected in money, the money is personal estate. It is movable, annexed to, and attendant on the person of the owner. The nature of the property is not changed by the manner in which the title to it is established; and corn is not the less a personal chattel because it is derived out of real estate. The profits of the shares were not, as has been erroneously supposed, real estate, until separated from the realty by the order of dividend. They ever were personal; and the dividend did not create the right to them, but merely



aparted a common property by a legal distribution: *Welles v. Cowles*, 2 Conn. 573. It would hardly be contended if Julia Norton had been the sole proprietor of all the turnpike stock, and a thousand dollars had been collected for toll, and was in the possession of the toll-gatherer at her death, that her heir, in opposition to her executor, could successfully claim the money. But how does the case hypothetically stated differ from the one existing before the court? In nothing, except that in the former she would have a right to the whole, and in the latter to a part. This difference in the cases neither affects the nature of the property nor the title of the owner; but merely the mode in which that shall be held in severalty which before was in common.

The highway laid across Julia Norton's land had existence in her life-time from the moment when the report of the committee was approved by the court: Stat. 377, tit. 86, c. 1, s. 11, ed. 1808. The order on Farmington to pay the damages assessed immediately became a debt, although not payable until a future specified period. It is not distinguishable from any other judgment for debt, or from a bond executed by Farmington, obliging themselves to pay a sum of money to Julia Norton, as a consideration for the right of way. The time at which the highway was to be opened, has no bearing on the point in controversy. This relates to the actual occupancy of the land, but the right to occupy having been established by the court, the correspondent consideration was established at the same time, and was payable without reference to the use of the property. It was not analogous with rent, which successively arises from actual observation, but it was the consideration of a sale through the intervention of the constituted authority.

With respect to the rents paid to the defendant, and claimed by him, as the executor of Julia Norton, the plaintiffs, as heir, must show that they have the title by an express or an implied contract. The land, from the use of which they arose, the defendant as the guardian of Miss Norton, leased, by parol agreement, and the contracts were to pay to him a stipulated sum of money for the enjoyment of the property. The rent was paid for the use of the land to the death of Miss Norton, and no longer, nor was the property occupied by the tenants after that event. It is difficult to discern even a plausible ground for the plaintiff's claim. If the parol leases were made for a year, as the plaintiffs have insisted, then, by the death of the ward, before expiration of the term, they were determined, and of con-

sequence, no rent ever became payable: *Granby v. Amherst*, 7 Mass. 1-6. And that they were thus determined, I think, is clear from this consideration, the guardian having an authority only uncoupled with an interest. Admitting, however, that he had legal power to make a valid lease for a year, a deficiency of right in the plaintiffs is equally obvious. The tenants expressly contracted with the defendant, solely and exclusively, to pay him for the use and occupation of the land, and the agreement being expressed, forbids all implication.

The plaintiffs have advanced a general proposition, that rent is incident to the reversion; and to establish the position recurrence has been had to the law established relative to the payment of rents. From this source they derive no aid, as the decisions referred to all proceed on the ground of express reservation in leases, and are nothing more than the construction given to express engagements. The expression that the rent is incident to the reversion is found in some of the cases; and in connection with the other facts in the case, it merely means that under the contract, construed according to the intendment of the parties, the reversioner is entitled to the rent. For example: if the reservation of rent be general, without naming any person, the law presumes it to have been the joint intent that it should be paid to him who advances the consideration: 6 Com. Dig. 209; 6 Bac. Ab. 20; 2 Cruise's Dig. 318, sec. 44. So, if the reservation be to a man and his heirs and assigns, the heir and remainder-man have a right to the rent falling due after their estates commenced: 6 Com. Dig. 209; 2 Cruise's Dig. 318, sec. 44. And if the reservation be to assigns, during the term the assignee is entitled to the rent, on the expressed intention: 6 Com. Dig. 210; 2 Cruise's Dig. 319, sec. 48; *Clun's case*, 10 Rep. 127, b.; *Sachaverell v. Froggatt*, 2 Saund. 367; S. C. 1 Vent. 161. But if the reservation be made to the lessor only, none but the lessor or his executors can recover on the contract: 6 Com. Dig. 209; 2 Cruise's Dig. 319, sec. 45. That is precisely the case before the court, the promise having been made to the defendant only. But determinations are unnecessary to establish the palpable proposition that on a promise to A. a suit cannot be maintained by B.

To the money demanded then the plaintiffs have no foundation of claim on express contract; and their assumed right on the ground of implied contract is equally indefensible. No implication is admissible; the express engagement to the defendant precluding it: *Expressum facit cessare tacitum*. Besides, an

action for use and occupation will only lie where the defendant holds by permission of or by demise from the plaintiff: *Gregory v. Badcock*, 2 Smith, 18; Esp. Dig. 20. In addition to this, the plaintiffs had no estate for the occupancy of which the money demanded was received by the defendant. It was the estate of Julia Norton, and the rents all accrued in her life-time. The heir has no title to rent accruing in the life-time of his ancestor unless by virtue of express contract: Co. Lit. 162 a; *Ognet's case*, 4 Rep. 49.

The other judges were of the same opinion.

New trial not to be granted.

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## GRANT v. THOMPSON.

[4 COUN. 208.]

**EVIDENCE AS TO SANITY.** To prove the sanity of a party at the time of his making a contract, evidence of the state of his mind before, at and after such time, is admissible. And evidence of acts of such party subsequent to the contract which tend to prove his recognition thereof, should be admitted as conducing to prove his sanity at the time when the contract was made.

**OPINIONS AS TO SANITY.** The mere opinions of witnesses relative to the sanity of a party are inadmissible, yet when taken in connection with the facts on which founded, they are admissible.

**ACTION ON A PROMISSORY NOTE.** Defense *non compos mentis* at the time of making the note. Defendant's counsel offered witness to testify to the insanity of defendant before, at and after the note was made; and they were permitted to give their opinions in connection with the facts upon which they were founded. The plaintiff then offered to prove that the note was secured by a certain mortgage from which defendant, at a time when he was of sound mind, received avails sufficient to satisfy the note. This evidence was rejected and plaintiff excepted.

Verdict for defendant. Writ of error to this court.

*P. Miner and Beers*, for the plaintiff in error.

*Bacon and J. W. Huntington*, contra.

**HOSMER, C. J.** This case presents the inquiry, whether the defendant was *non compos mentis* at the execution of the note in question; and to establish this fact the defendant was permitted to show certain acts evincive of a continued and uninterrupted lunacy from a period commencing before the note was

given and terminating some time after. In the investigation of a point which often is of great difficulty, it is frequently indispensable to go into history of the supposed lunatic's mind, both before, at and after his contract, in order to ascertain his real condition at the moment of entering into an agreement. Such testimony is undoubtedly admissible, and such has been the invariable practice: *Dickinson v. Barber*, 9 Mass. 225 [6 Am. Dec. 58].

The county court rejected the mere opinion of the witnesses relative to the defendant's insanity, but admitted them in connection with the facts on which they were founded; and in doing this they discriminated soundly and legally. This is not a novelty, but sanctioned by the usual practice of courts in such cases: *Swift's Ev.* 111; *Poole v. Richardson*, 3 Mass. 330; *Dickinson v. Barber*, 9 Id. 227 [6 Am. Dec. 58]. Such evidence is admissible to confirm the witness and to attach a proper confidence in his testimony, and to form a correct estimate of the credit due to him. In addition to this, although it would be dangerous in its tendency, to admit the uncorroborated opinion of a witness relative to the operations of another's mind, yet when it is found to be presumptively supported by facts, it carries with it a convincing weight. The best testimony that the nature of the case admits of ought to be adduced; and on the subject of insanity, in my judgment, it consists in the representation of facts, and of the impressions which they made.

That the defendant received money for his indemnity from the note in question, at a time when confessedly he was of sound mind, was a fact which should have been received in evidence. This it is true would not ratify or confirm a contract originally void; but it had a tendency to prove the recognition of it, and that the defendant was of sound mind when he made the note. If it conduced in the smallest degree to prove the sanity of the defendant it should have been received, and left to the jury, who are the legal judges of the weight of testimony: *Gibson v. Hunter*, 2 H. Bl. 205, 288; *Gardner v. Preston*, 2 Day, 205 [2 Am. Dec. 91]; and that it did thus conduce, I entertain no doubt. On this sole ground, the judgment of the county court was manifestly erroneous.

The other judges were of the same opinion.

Judgment to be reversed.

## GOSHEN v. STONINGTON.

[4 Conn. 208.]

**SUPPORTING PAUPER—IMPLIED CONTRACT.**—Where the plaintiffs furnished supplies to a pauper of the town of the defendants but residing with the plaintiffs, *assumpsit* will lie without proof of an actual request or express promise, the plaintiffs being compelled by law to make the advancements.

**CLERGYMAN'S ACT AS A PUBLIC OFFICER.**—A clergyman in the administration of marriage is a public civil officer, and his acts in the celebration of marriage are admissible as *prima facie* evidence of his official character.

**VALIDITY OF RETROSPECTIVE ACTS.**—An act rendering valid to all intents and purposes, all marriages previously celebrated in the state by an ordained minister, qualified and empowered to celebrate them according to the forms and usages of any religious society, is not void as repugnant to the constitution of the United States.

**SAME.**—Such act is not void because it may impair vested rights, and although it may affect the rights of individuals, the judiciary have no authority to declare it void if it be just and reasonable and conducive to the public good.

**STATUTES CONSTRUED PROSPECTIVELY.**—If a statute be not explicitly retrospective, the court will not by construction, give it a retrospective operation.

**ASSUMPSIT** to recover three hundred and eighty dollars expended by the plaintiffs at the special request of the defendants for the support of Betsey Cooke, the wife of Joseph Cooke, and their five children, from October 8, 1818, to September 9, 1820, alleged paupers, having their legal settlement in the town of Stonington and residing in Goshen, where the support was furnished. Whether Betsey and the children were legally settled in Stonington, depended upon the validity of her marriage with Joseph. Fourteen years before this action was commenced and before any of the children were born, Joseph and Betsey were married by Henry Christie then a resident of Connecticut, but at the time of the trial living at some place in New York not ascertained. To prove that Christie was an ordained deacon of the Methodist Episcopal Church, having authority to solemnize marriage, the plaintiffs offered evidence to show that about the year 1791, he was licensed to preach, and did actually preach as a traveling circuit preacher; that he attended the interment of the dead, baptized, celebrated marriages, assisted the ruling elder at the administration of the eucharist, and was generally received and treated by the elders, brethren in the ministry, and the people of that denomination within his limits, as an ordained deacon of the Metho-

dist church. This evidence was admitted against defendant's objection who proved that the mode of constituting a deacon according to the constitution of the Methodist church, was by election by the general conference and ordination by the bishop.

There was no proof on the part of the plaintiffs of any actual request made by the defendants to support the paupers, or of any express promise to pay therefor. But the plaintiffs claimed to have proved that immediately upon Betsey and her children becoming chargeable to the plaintiffs, they gave notice to the defendants, and that she and her children were likely to continue so, and requested defendants to take them away, which they neglected to do.

The jury were instructed that an actual request to the plaintiffs to furnish the support was not necessary to be proved; and that if Christie was duly ordained according to the usages of the Methodist church, the marriage was validated by the act of 1820, and it was unnecessary to inquire whether he "was settled in the work of the ministry," within the meaning of the former act respecting marriages.

Verdict for the plaintiffs and motion for a new trial.

*Bacon*, in support of the motion. A past consideration without a previous request will not support *assumpsit*: 1 *Swift's Dig.* 687; *Jeremy v. Goochman*, Cro. Eliz. 442; *Hayes v. Warren*, 2 Str. 933; *Bulkley v. Landon*, 2 Conn. 404, 415, 416. The marriage was originally void: *Roberts v. State Treasurer*, 2 Root, 381; and no settlement thereby gained by Betsey and the children: *Chinham v. Preston*, 2 Bl. Rep. 192; *Milford v. Worcester*, 7 Mass. 48, 57, 58. The act of 1820 cannot make the marriage valid; to give such a construction to the act would render it retrospective and void: *Bonham's case*, 8 Co. 113; *Helmore v. Shuter*, 2 Mod. 310; *Wales v. Stetson*, 2 Mass. 143, 146 [3 Am. Dec. 39]; *Call v. Hagger*, 8 Id. 423; *King v. Dedham Bank*, 15 Id. 447 [8 Am. Dec. 112]; *Dash v. Van Kleeck*, 7 Johns. 477, 502 [5 Am. Dec. 291]; *Society, etc. v. Wheeler*, 4 Wheat. 135. Improper evidence was admitted: *Rhind v. Wilkinson*, 2 Taun. 237; *Beers v. Hawley*, 3 Conn. 111; *Parry v. Collis*, 1 Esp. 399; *Williams v. East India Co.*, 3 East, 192; *Commonwealth v. Kinnison*, 4 Mass. 646.

*Benedict and North, contra.*

HOSMER, C. J. In this case several questions have been raised, on which I shall express an opinion in the order in which they have been presented by the defendant's counsel.

1. It has been objected that an actual request for the supplies furnished the paupers, or an express promise of payment was requisite to fix a legal liability on the defendants. If the advancements made had been voluntary, the objection would be well founded and fatal to the plaintiff's hopes, but they were compelled by law to make them, and in this event the law gives a right of recovery. The plaintiff's case may be assimilated to the payment of money by a surety for his principal, which furnishes a sufficient cause of action without an actual request or promise: 1 Chit. Pl. 340; *Exall v. Partridge*, 8 T. R. 308, 310; *Child v. Morley*, 8 Id. 610, 614. It has been said that the paupers do not appear to have had their residence in Goshen when their necessities were supplied. No such objection was made on the trial; for had it been, the plaintiffs must have been nonsuited. The fact, however, on this point has been misconceived. The motion states that the plaintiffs claimed to have proved, that "immediately upon the said Betsy and her children becoming chargeable to the plaintiffs, they gave notice thereof to the defendants, and that she and her children were likely so to continue, and requested the defendants to come and take them away, which they neglected to do. It is, therefore, unquestionable that the title of the plaintiffs to recover was placed on the foundation of an actual residence of the paupers in Goshen, and necessary advancements made to them.

2. The evidence of acts done by Christie, admitted to prove his ordination, has given birth to the next objection. A clergyman in the administration of marriage is a public civil officer, and in relation to this subject is not at all distinguished from a judge of the superior or county court, or a justice of the peace in the performance of the same duty. In *Berryman v. Wise*, 4 T. R. 306, it was decided by the court of king's bench, as it had been previously decided by all the judges in Westminster hall, in the case of Gordon, that the legal capacity of peace officers, justices of the peace, constables, etc., was sufficiently proved by their having acted in those characters, without the production of their appointments; and in *Vernon v. East Hartford*, 3 Conn. 475, the same principle was recognized by this court. The rules of evidence are of an artificial texture, framed for convenience in justice, and founded on good reason: *Omychund v. Barker*, 1 Atk. 46, and the admission of the acts of a clergyman in the celebration of marriage as *prima facie* proof of his official character, is not only commodious, but may be necessary, in order to prevent the deplorable consequences which might result from

the requirement of higher evidence. It would be a gross anomaly to admit the acts of one public officer as presumptive of his official capacity, and to deny the same evidence when the official capacity of another public officer is in question.

3. An objection has been made to the validity of the marriage between Betsey Cook and her husband, upon which the claim of the plaintiffs is founded. By the statute law, existing at the time, when this connection was supposed to be formed, a minister invested with authority for this purpose, must have been ordained and settled in the work of the ministry. Christie, the person who joined Cook and wife in matrimony, was a Methodist clergyman, duly ordained, itinerating, as is the custom of many of that order, and not settled, within the intendment of the law. To remedy this and similar inconveniences which had arisen from a misconstruction of the statute, and which, from their number, had become formidable, the legislature in May, 1820, passed an act rendering valid to all intents and purposes all marriages performed by an ordained minister, qualified and empowered to celebrate them, according to the forms and usages of any religious society or denomination. That Cook and wife were married, by an authorized clergyman, conformably to the "forms and usages" of the religious denomination of which he was a member, is not susceptible of dispute, but to the efficacy of the confirmatory act of May, 1820, several objections have been made.

First, it was said, that the retrospective operation of the law may and ought to be obviated, by construing it to intend the validation of marriages merely, without imparting to it any retrospection as to the rights of others. It must be admitted, that by construction, if it can be avoided, no statute should have a retrospect anterior to the time of its commencement: *Helmores v. Shuter*, 2 Show. 17; *Dash v. Van Kleeck*, 7 Johns. 477, 485 [5 Am. Dec. 291]. This principle is founded on the supposition, that laws are intended to be prospective only. But when a statute either by explicit provision, or by necessary implication is retroactive, there is no room for construction, and if the law ought not to be effectuated, it must be on a different principle. The act of May, 1820, is, in its expression, incontrovertibly clear and definite. It does not pause, after imparting validity to marriages, but confirms them "to all intents and purposes." By this phraseology, they are declared to be valid *ab initio*. By limiting the act to one intent and purpose, we should contravene a most intelligible expression that the contemplated



marriages shall be valid "to all intents and purposes." The sweeping universality of this phraseology cannot be parried by construction.

It is an admitted principle, that where it is manifestly within the intention of the legislature, that a subsequent act shall not control the provisions of a former, it shall not be construed to have such operation, even though the words, strictly and grammatically would have that effect. But the intention of the legislature must first be ascertained from some legitimate source, before we can contravene its letter. If the expressions of the law are clear and precise, and pointedly oppose the construction demanded, unless the object of it furnishes a reason for deviating from the plain meaning of its words, the expression must be considered as indicative of the intention. "Where the meaning of the statute is plain and evident, we must construe it according to the words, and it never can be admitted to give a construction to a statute different from the import of the words, from a conjecture that the legislature had a different meaning:" *Curtis v. Hulburt*, 2 Conn. 309, 315. There is nothing apparent on the act of May, 1820, by which the purpose of its enactment is defined, otherwise than by the language in which it is expressed, and if the occasion of passing it may be resorted to, the evidence resulting from this source, demonstrates that the words of the law and the intent of the legislature were precisely identical.

Secondly, it has been insisted that the law in question is unconstitutional. There is no pretense that it is opposed to the constitution of the United States, that is, that the confirmatory act is a law *ex post facto*, or one which impairs the obligation of contracts. By the second article of the constitution of Connecticut it is affirmed that "the powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another." The law of May, 1820, has been considered as the exercise of a judiciary power, and for this reason in contravention of the constitution; but the supposition is wholly destitute of support, as the act in question does not affect to give a construction to the former law, but most manifestly purports to impart validity to certain proceedings which were erroneously supposed to be legal, and which the statute did not authorize. The power exercised in its nature is exclusively legislative, and not opposed to the recited articles of the constitution.

Lastly, the defendants have insisted, and on this objection the principal stress has been laid, that the law of May, 1820, being retrospective and in violation of vested rights, it is the duty of the court to pronounce it void. The retrospection of the act is indisputable, and equally so is its purpose to change the legal rights of the litigating parties. Whether, in doing this, there has been injustice will be an inquiry in a subsequent part of my opinion. It is universally admitted, and unsusceptible of dispute, that there may be retrospective laws impairing vested rights which are unjust, neither according with sound legislation nor the fundamental principles "of the social compact." If, for example, the legislature should enact a law, without any assignable reason, taking from A. his estate and giving it to B., the injustice would be flagrant, and the act would produce a sensation of universal insecurity. On the other hand, laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principles and highly promotive of the general good, have often been passed and as often approved. In the case before us the defendants have expressly conceded, that the law in question is valid so far as respects the persons *de facto* married and their issue. But in that event would it not have a retrospective operation on vested rights? The man and woman were unmarried, notwithstanding the formal ceremony which passed between them, and free in point of law to live in celibacy or contract matrimony with any person at pleasure. It is a strong exercise of power to compel two persons to marry without their consent; and a palpable perversion of strict legal right. At the same time the retrospective law, thus far directly operating on vested rights, is admitted to be unquestionably valid, because it is manifestly just.

I very much question whether there is an existing government in which laws of a retroactive nature and effect, impairing vested rights, but promotive of justice and the general good, have not been passed. In England such laws frequently have been enacted; and the act of 26 Geo. II., cap. 33, giving validity to former marriages, celebrated in any parish, church or public chapel, is precisely of this description: Doug. 661, n. In the neighboring state of Massachusetts there have been many such laws: *Foster v. The Essex Bank*, 16 Mass. 257 to 261 [8 Am. Dec. 135], and the interposition of our own legislature in similar cases is familiar to gentlemen of the profession. The judgments of courts, when by accident a term has fallen through, have been established; the doings of a committee and conservator not

strictly legal, have been confirmed; and other laws have been passed, all affecting vested rights, but being incontrovertibly just, no disapprobation has ever been expressed. Who ever found fault with the law authorizing the commissioners to require suitable railings on turnpike roads; and yet, in respect of all anterior grants, the act was retrospective, and put on the companies a new and perhaps an expensive burden. It, however, was just, demanded by the public good, and the subject of universal acquiescence.

The question on which my attention is now exercised has frequently arisen in courts and has never been decided. It is not free from difficulty on whichsoever side it is viewed; and although many persons have expressed an opinion on the abstract inquiry, it yet remains to be judiciously determined. Before I take a brief review of the cases on this subject, I will put out of question some arguments and decisions which tend only to embarrass the matter in debate. It has been said to be a principle of the English common law that a statute is not to have a retrospective effect: Bracton, lib. 4, fol. 228; 2 Inst. 292. The cases do not warrant the point assumed; but this proposition they do establish, that a statute is not to be construed as having a retrospect: 6 Bac. Ab. 370, Gwil. ed. Such a construction ought never to be given unless the expression of the law imperiously requires it. The cases of *Heimore v. Shuter*, 2 Show. 17; *Couch v. Jeffries*, 4 Burr. 2460, were determined on this principle. To the same effect only are *Osborne v. Hager*, 1 Bay, 179; *Ogden v. Blackledge*, 2 Cranch, 272; *Beadleston v. Sprague*, 6 Johns. 101; *Wilkinson v. Meyer*, 2 Ld. Raym. 1250; although some have considered them as bearing directly on the question under discussion.

In the constitution of some of the states, provision has been made inhibiting the legislature from passing retrospective laws. This, undoubtedly, is a demonstration that in the opinion of those states, such power ought never to be exercised by their legislatures, but it does not authorize the inference that they would not have been invested with it, had there been no opposing constitutional provision. The opposite may more fairly be deduced; and hence the limitation imposed on the legislature by the constitution. I, however, shall make no deduction from this source. I know not whether the measure ought to be ascribed to a recognition of the power in question, unless restrained, or to a prudent precaution lest it should be assumed; and it is the only fair result, in my judgment, that it has no relevancy to the question I am endeavoring to discuss.

I shall not attempt to derive aid from the civilians who sanction a retrospective law, if it be express; but on the opinion of Lord Bacon I am disposed to place more dependence. Opposed, as he manifestly is, to the general allowance of retroactive laws, he admits their validity in cases, "*ubi leges cum justitia retrospicere possent.*" De Aug. Scient. lib. 8, c. 3, Aphor. 47-51. Sir William Blackstone, 1 Com. 91, asserts that where the main object of a statute is unreasonable, the judges are not at liberty to reject it, for, says he, "that were to set the judicial power above that of the legislature, which would be subversive of all government." "If there are any absurd consequences, manifestly contradictory to common reason, arising collaterally out of acts of parliament, they," says that elegant author, "with regard to those collateral consequences are void." In a note on this passage by the learned Mr. Christian, he remarks in the following language: "If an act of parliament is clearly and unequivocally expressed, with all deference to the learned commentator, I conceive it is neither void in its direct nor collateral consequences, however absurd or unreasonable they may appear."

This question occurred in the case of *Calder v. Bull*, 3 Dall. 386, before the supreme court of the United States, which contains many interesting observations on the subject before us; but eventually it was determined on a different ground. Patterson, J., manifested a strong aversion to retrospective laws of every description, as being unsound legislation, and not accordant with the fundamental principles of the social compact, but expressed no opinion as to the possible disallowance of them by the judiciary. Chase, J., declared that he could not recognize the omnipotence of state legislatures. He observed "that the purposes for which men enter into society will determine the nature and terms of social compact; the nature and ends of legislative power will limit the exercise of it;" and throughout his opinion he exhibits a strong inclination of mind against laws which are retroactive. But without deciding the question, after a designation of laws which are retrospective, he concludes by saying: "Such laws may be proper or necessary, as the case may be." Judge Iredell delivered a clear and decided opinion containing principles entirely averse to those which his associates had expressed. "If," says he, "a government composed of legislative, executive, and judicial departments were established by a constitution which imposed no limit on the legislative power, the consequence would inevitably be that

whatever the legislative power chose to enact would be lawfully enacted; and the judiciary power could never interpose to pronounce it void. It is true that speculative jurists have held that a legislative act against natural justice must in itself be void; but I cannot think that under such a government any court of justice would possess the power to declare it to be so." It is incontrovertible that the question under discussion was not decided in *Bull v. Calder*, and even Chase, J., admitted that retrospective laws might be proper and necessary, while Iredell, J., delivered an explicit opinion that they were beyond the correction of the judiciary.

In *Dash v. Van Kleeck*, 7 Johns. 506 [5 Am. Dec. 291], the validity of retrospective laws underwent a very able and learned discussion, but eventually on this point nothing was decided. The judges universally agreed in the legal propriety of construing a statute in prevention of its having a retrospect, if the court were not restrained by expressions explicit and unequivocal. Yates, J., considered the legislature as possessed of competent authority to pass the law in question, and Thompson, J., without having expressed a determinate opinion on the validity of retroactive laws, came to the result that a law "ought not to have a retrospective operation, unless so declared in the most unequivocal manner." Chief Justice Kent was pointedly opposed to the retrospection of laws impairing vested rights in any event; while Spencer, J., insisted "that (their) state legislature, when acting within the pale of the Constitution of the United States, and of (that) state, has the same omnipotence which Judge Blackstone ascribes to the British parliament." From this brief view of *Dash v. Van Kleeck*, there is no ground of pretense that the controverted point relative to retroactive laws underwent a decision.

In the sister state of Massachusetts, it repeatedly has been determined that anterior vested rights ought not to be impaired by construction: *Wales v. Stetson*, 2 Mass. 143, 146 [3 Am. Dec. 39]; *Call v. Hagger*, 8 Id. 423, 427; *King v. Dedham Bank*, 15 Id. 447 [8 Am. Dec. 112], and an *obiter* opinion was expressed in *Foster v. The Essex Bank*, 16 Mass. 245 [8 Am. Dec. 135], that an act of the legislature which injures private property, or disturbs vested rights, should be declared void.

In result, I feel myself authorized to assert that the question, where no constitutional objection exists, whether the judiciary may declare a retrospective law operating on vested rights to be void, is undetermined; that men of profound learning and ex-

alted talents have greatly differed on the subject, and that it is an inquiry beset with difficulty. With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist what I know is not only an incredible supposition, but a most remote improbability, a case of the direct infraction of vested rights, too palpable to be questioned, and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary. If, for example, a law were made, without any cause, to deprive a person of his property, or to subject him to imprisonment, who would not question its legality, and who would aid in carrying it into effect?

On the other hand, I cannot harmonize with those who deny the power of the legislature to make laws, in any case which with entire justice operate on antecedent legal rights. A retrospective law may be just and reasonable; and the right of the legislature to enact one of this description, I am not speculatist enough to question. I believe no person will deny that the exercise of legislative authority, merely, and without further consequences, to confirm marriages not duly celebrated, is valid, although clearly retrospective, and manifestly operating on the rights of individuals. And as every law intrinsically implies an opinion of the legislature, that they had authority to pass it, and that it is just and reasonable on all occasions that may arise, it is proper to demand that the supposed unjust violation of legal right, by statute, should be established with great clearness and certainty. If a judge of the supreme court of the United States was authorized in the assertion, *Calder v. Bull*, 3 Dall. 386, 395, that he would not decide any law to be void, except in a very clear case; with equal propriety may other judges adopt the same resolution in respect of laws which cannot be brought to the definite test of a written constitution, but which as violations of the social compact are claimed to be unwarrantable.

The act of May, 1820, was intended to quiet controversy and promote the public tranquillity. Many marriages had been celebrated as was believed according to the prescriptions of the statute. On a close investigation of the subject, under the prompting scrutiny of interest, it was made to appear that there had been an honest misconstruction of the law; that many unions which were considered as matrimonial, were really meretricious; and that the settlement of children in great

numbers, was not in the towns of which their fathers were inhabitants, but in different places. To furnish a remedy co-extensive with the mischief, the legislature have passed an act confirming the matrimonial engagements supposed to have been formed, and giving to them validity as if the existing law had precisely been observed. The act intrinsically imports that the legislature considered the law of May 1820, to be conformable to justice and within the sphere of their authority. It was no violation of the constitution, it was not a novelty, such exercises of power having been frequent and the subject of universal acquiescence, and no injustice can arise from having given legal efficacy to voluntary engagements and from accompanying them with the consequences which they always impart. The judiciary, to declare the law in question void must first recognize the principle, that every retrospective act, however just and wise, is of no validity; and that for the correction of every deviation of the legislature from absolute right, theirs is the supremacy. Impressed with the opinion that this is beyond the confines of judiciary authority, I am satisfied with the decision at the circuit and would not advise a new trial.

CHAPMAN, BRAINARD and BRISTOL, JJ., were of the same opinion.

PETERS, J., concurred in the result, on the ground that the marriage was originally valid, but he thought that the confirming act was void.

New trial not to be granted.

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The constitutional principles here laid down have given this case very general importance, and have entitled it to be regarded as one of our leading cases on this branch of the law. It is referred to with the highest respect by the courts in other states, as in *Bender v. Crawford*, 33 Tex. 745; S. C., 7 Am. Rep. 277; *Danville v. Pace*, 25 Gratt. 1; S. C., 18 Am. Rep. 670; *Pryor v. Downey*, 50 Cal. 388; S. C., 19 Am. Rep. 661; *Huffman v. Alderson*, 9 W. Va. 627, decided 1876.

The courts in Connecticut, in a series of decisions, have affirmed its doctrine, as in *Bridgeport v. Hubbell*, 5 Conn. 240; *Mather v. Chapman*, 6 Id. 56; *Beach v. Walker*, Id. 197; *Thames Co. v. Lathrop*, 7 Id. 557; *Savings Bank v. Bates*, 8 Id. 511; *Brewster v. McCall*, 15 Id. 290; *Bridgeport v. Housatonic R. R.*, Id. 496; *Plumb v. Sawyer*, 21 Id. 355; *Savings Bank v. Allen*, 28 Id. 102, where it is cited as a leading case throughout the country; *Welch v. Wadsworth*, 30 Id. 155; *State v. Smith*, 38 Id. 398.

RETROSPECTIVE LAWS.—There is no absolute constitutional prohibition of retrospective legislation in most of the states, but there are cases where legislation of this character is opposed to certain fundamental constitutional principles, as violating contracts, or as divesting rights already accrued: *State v. Squires*, 26 Iowa, 340; *Shonk v. Brown*, 61 Pa. St. 320; *Lane v. Nelson*, 79

Id. 407. In some constitutions there are provisions against retroactive laws, and probably in these cases, statutes having a retrospective operation would be very strictly construed: *Cooley*, Const. Lim. 370. It is, however, with reference to the constitutional inhibition against laws which "impair the obligation of contracts," that it is now proposed to examine this subject.

There is a uniform, settled doctrine established in the cases, that the legislature should alone judge of the policy or wisdom of the law, and the courts have no right to question its power in such cases, but should carefully abstain from declaring a statute void, unless it is plainly and unequivocally in violation of existing rights guaranteed by the constitution. This position is carefully laid down by *Cooley* in his Const. Lim. 168, and the principal case, fully holds this doctrine. So the court say in *Welch v. Wadsworth*, 30 Conn. 149: "In the case of *Goshen v. Stonington*, this court had occasion to examine this subject, and a very clear and thorough review of it, in the light of principle and judicial determination is contained in the opinion of the court as given by Chief Justice Hosmer. That decision has since been followed by others, and the law is well settled in this court. The rule deducible from those decisions and others is, that although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred, and if it is shown to the court, with entire clearness and certainty to be so unreasonable and unjust in its operation upon antecedent legal rights, that the action of the legislature cannot be vindicated by any reasonable intendment or allowable presumption, it is our duty to declare it void."

But how far legislation of a retroactive character can proceed so as not to infringe the constitutional provision against violating contracts, or interfering with vested rights, is an extremely nice question, and the adjudications cut close on each side; for the different decisions, while professedly based on the general doctrine, proceed very often on their peculiar facts. However, from the various decisions, we can lay down certain general principles on which our courts are now agreed. At the outset, we can lay it down as sound, and as a position sustained by all the authorities, that no act can be constitutional which takes from a person a vested right accrued to him under a contract; or takes his property for the benefit of another person. But the inquiry then arises, what is a vested right? When has a person secured such a right under a contract, so as to entitle him to the protection of the constitution? These cases present much difficulty, and the various cases that arise are mostly decisions defining or specifying instances of such vested rights.

That laws have been sustained, that in some measure interfered with vested rights, no one can deny. The best general rule laid down touching the validity of such statutes is given in 1 Kent's Com. 456, where it is stated that statutes which go to confirm existing rights, and in furtherance of the remedy by curing defects, and adding to the means of enforcing existing obligations are clearly valid when just and reasonable, and conducive to the general welfare, even though they might in some degree infringe upon vested rights.

So the position is laid down in *Savings Bank v. Allen*, 28 Conn. 97, that when a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of parties and promote justice, then both as a matter of right and of public policy affecting the peace and welfare of the community the law should be sustained. In his work on Constitutional Limitations, Judge *Cooley* enumerates a number of retrospective statutes, the constitutionality of which is almost universally conceded. Among these are statutes validating antecedent illegal mar-



riages, as in the principal case; confirming city ordinances which had failed to take effect for want of registration, and by reason of such confirmation establishing liens for tax assessment upon private property, statutes abolishing penalties and forfeitures, and taking away rights of appeal in cases pending; and citing these and other illustrations of retrospective laws, the author proceeds: "On the same principle legislative acts validating invalid contracts have been sustained, when these acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of polity and not of constitutional power." Cooley, 374. On this general statement see: *Underwood v. Lilly*, 10 Serg. & R. 101; *Estep v. Hutchman*, 14 Id. 435; *Smith v. Merchand*, post; *Tate v. Stoolzfoss*, 16 Id. 35; *Bleakney v. Farmers' etc. Bank*, 17 Id. 64; *Hepburn v. Curtis*, 7 Watts, 300; *Lane v. Nelson*, 79 Pa. St. 407; *Grim v. Weisberg*, 57 Id. 433; *People v. Seymour*, 16 Cal. 332; *State v. Union*, 23 N. J. 355; *Mitchell v. Deeds*, 49 Ill. 416; *Foster v. Essex Bank*, 8 Am. Dec. 135; *Oriental Bank v. Freeze*, 18 Me. 109; *Rich v. Flanders*, 39 N. H. 304; *Langdon v. Strong*, 2 Vt. 234; *Watson v. Mercer*, 8 Pet. 88; *Grove v. Todd*, 41 Md. 633; *Kunkle v. Franklin*, 13 Minn. 127; *Woodruff v. Scruggs*, 27 Ark. 26.

But in these cases, where remedial statutes have been sustained, and certain defects or informalities removed, it must be assumed that there was jurisdiction in the first place, and that something was attempted which could be lawfully done, and which through some oversight or failure was prevented or defeated. If there was no jurisdiction, the legislature cannot give life to that which before was dead; it cannot validate what before was essentially void: Cooley, Const. Lim. 382; *Pryor v. Downey*, 50 Cal. 388; *Richards v. Rote*, 68 Pa. St. 248; *Shonk v. Brown*, 61 Id. 320; *Lane v. Nelson*, 79 Id. 407; *Kimball v. Rosenthal*, 5 Cent. L. Journ. 372; *People v. Lynch*, 51 Cal. 15; *Billings v. Dellen*, 15 Ill. 218; *Abbott v. Lindenbower*, 42 Mo. 162. In *Conway v. Cable*, 37 Ill. 82, it was held that the legislature could not validate a tax sale effected by fraudulent combination between the officers and the purchasers. This is particularly true with reference to void judgments, which cannot be cured by a subsequent statute: *Nelson v. Roundtree*, 23 Wis. 367; *State v. Doherty*, 60 Me. 504; *State v. Squires*, 26 Iowa, 340; *Griffin v. Cunningham*, 20 Gratt. 109.

So, where rights have been barred by statutes of limitations, the legislature cannot revive them: *Girdner v. Stephens*, 1 Heisk. 280; *Yancy v. Yancy*, 5 Id. 353. Swayne, J., says, in *Edwards v. Kearzey*, 96 U. S. 603: "Statutes of limitations are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public, as well as individuals, are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short, and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void."

In *Wright v. Oakley*, 5 Met. 400, the power was denied the legislature to revive a claim barred by the statute of limitations. So, in *Kinsman v. Cambridge*, 121 Mass. 558; *Rockport v. Walden*, 54 N. H. 167; *Atkinson v. Dunlap*, 50 Me. 111; *Davis v. Minor*, 1 How. Miss. 183; *Hicks v. Steigleman*, 49 Miss. 377; and see Cooley, Const. Lim. 365, and cases cited. In *Hyman v. Bayne*, 83 Ill. 256, it was held that an act was constitutional which provided

that causes of action arising in another state, and there barred, should also be barred, notwithstanding the statute of the state where they were sought to be enforced. In *Huffman v. Alderson*, 9 W. Va. 616, a statute provided that when any right of action has been or shall be obstructed by war, insurrection, or rebellion, the time that such obstruction may have continued shall not be reckoned as any part of the time in which said right ought to be prosecuted. It was held that the statute was constitutional as applied to actions on express contracts, which were already barred at the time the act was passed.

**VESTED RIGHTS.**—It is an admitted principle, that vested rights cannot be destroyed or impaired; but what are vested rights? It would not be easy to obtain a general rule from the decisions. Says Mr. Justice Paxon, in *Lane v. Nelson*: "It is settled by a current of authority, that the legislature cannot by an arbitrary edict, take the property of one man and give it to another; and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead. \* \* \* To exercise judicial powers is not within the legitimate scope of legislative functions, and when vested rights are divested by acts of that character, they will and ought to be judged inoperative, null and void: *Bagg's appeal*, 43 Pa. St. 512."

A good attempt at definition is given in *Baughers v. Nelson*, 9 Gill, 299, where it is said: "When vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without violating any principle of sound morality. In the language of Judge Duncan in *Satterlee v. Matthewson*, 16 Serg. & R. 191, there can be no vested right to do wrong. In the nature of things there can be no vested right to violate a moral duty or to resist the performance of a moral obligation."

Cooley says: "The chief restriction upon this class of legislation is that vested rights must not be disturbed; but in its application as a shield of protection, the term 'vested rights' is not used in any narrow or technical sense or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice:" Const. Lim. 358. Again the same author says: "It would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable to the present or future enjoyment of property, or to the present or future enjoyment of a demand or a legal exemption from a demand made by another." As near as possible, a general rule on this subject may be thus expressed: A vested right, such as a legislative act cannot destroy or impair, is a right in some property, a right *in rem*, or a fixed certain claim for the discharge of, or release from, some debt or obligation due from or to a person resulting from an agreement or contract, which the law recognizes and enforces, and implying also a right to a remedy to enforce such right or obligation. To render a law unconstitutional in this respect, it is not necessary that the act of the legislature should import an actual destruction of the obligation of a contract; it is sufficient that the act imports an impairment of the obligation, so that it is weakened or rendered less operative. The test does not so much depend upon the extent of the change which the law effects; any deviation from its terms by postponing or accelerating the period of per-

formance agreed on, imposing conditions not expressed in the contract, or dispensing with any of those stipulated, impairs its obligation: *Green v. Biddle*, 8 Wheat. 1; *McCracken v. Hayward*, 2 How. 608; *Planters' Bank v. Sharp*, 6 Id. 301; *Walker v. Whitehead*, 16 Wall. 314; *Lapsley v. Brashears*, 4 Litt. 47; *McAuley v. Brooks*, 16 Cal. 11; *Robinson v. Magee*, 9 Id. 81; *People v. Powl*, 10 Id. 563; *Edmondson v. Ferguson*, 11 Mo. 344; *Jones v. Crittenden*, 6 Am. Dec. 531; *Winter v. Jones*, 10 Ga. 190; *Townsend v. Townsend*, Peck. 1. The impairment may be in such a manner as to make the contract more beneficial to one party, and less so to another than by its terms it purports to be: *Baily v. Gentry*, 1 Mo. 164. One of the tests that a contract has been impaired is that the value of it has, by legislation, been materially diminished: *Planters' Bank v. Sharp*, *supra*; but it is not every statute which affects the value of a contract, will impair its obligation: *Curtis v. Whitney*, 13 Wall. 68; *Charles River Bridge v. Warren Bridge*, 11 Peters, 429.

In *Edwards v. Kearzey*, 96 U. S. 595, Mr. Justice Swayne very learnedly examines the meaning of the term "impair;" and says: "The lexical definition of 'impair' is 'to make worse, to diminish in quality, value, excellence or strength; to lessen in power, to weaken, to enfeeble, to deteriorate': Webster's Dict."

A recent decision in Illinois, *Helm v. Webster*, 85 Ill. 116, illustrates the application of the rule that a vested right cannot be divested by a legislative act. Here it is decided that where by the terms of the conveyance of land for a street, or under the law in force at the time of the opening of a street, the title to the ground embraced by the street will revert to the former owner on its abandonment or vacation, the legislature has no constitutional power to divest such former owner of his right, and to vest the title in another. An application of the doctrine appears also in a recent decision of the supreme court: *Keith v. Clark*, decided December, 1878: See 97 U. S. The State bank of Tennessee having organized in 1838, the bank of Tennessee, agreed by a clause in the charter to receive all its issues of circulating notes in payment of taxes; but by a constitutional amendment adopted in 1865, it declared the issues of the bank during the insurrectionary period void, and forbade their receipt for taxes. It was held that this was forbidden by the constitutional provision against impairing the obligation of contracts. So in *Edwards v. Kearzey*, 96 U. S. 595, the law of North Carolina, exempted certain homestead property from execution at the time the contract was made; and a subsequent law enlarged the value of the homestead thus exempt. It was held that the latter could not operate on contracts previously made. So, where a charter conferred upon a company power to regulate its tolls for a certain length of time, and during this period the legislature passed an act regulating the same tolls, it was held to be unconstitutional: *Sloan v. Pacific R. R.*, 61 Mo. 24. So an act providing that "debts due on open accounts and other demands not heretofore bearing interest by law, shall bear interest" is void so far as it relates to debts previously contracted: *Goggans v. Turnispeed*, 1 S. C. 80.

RIGHT TO DENY A DEFENSE.—Whether a certain defense, as the plea of usury, can be taken away without interfering with the obligation of a contract has been considered in many cases, and the prevailing current of authority is in favor of the constitutionality of such legislation. This subject was elaborately considered in the leading case of *Curtis v. Leavitt*, 15 N. Y. 1. Mr. Justice Paige says, p. 229: "The defense of usury is in the nature of a penalty or forfeiture, and may, at any time be taken away by the legisla-

ture in respect to previous as well as subsequent contracts, without trunchnig upon any vested rights. A proposition that a party can have a vested right in enforcing a penalty or forfeiture, against which it is the office of a court of equity to relieve, is a legal solecism. Statutes of usury are highly penal in their character, and the defense of usury has always been regarded as an unconscientious defense, and has never received the favor of either courts of law or equity." All the judges, seven in number, then composing the court, substantially concurred in this view. A recent Virginia case follows the doctrine here laid down. In *Danville v. Pace*, 25 Gratt. 1; S. C., 18 Am. Rep. 663, a statute of Virginia provided that "no corporation shall hereafter interpose the defense of usury in any action, nor shall any bond, etc., of such corporation be set aside, impaired or adjudged invalid by reason of anything contained in the laws prohibiting usury." It was held it applied to contracts made previously, even though in suit, and that it was not in violation of the constitution of Virginia, or of that of the United States. The opinion in this case is peculiarly able, and the cases on the subject are fully reviewed by Staples, J. The same position is held in *Parmlee v. Lawrence*, 48 Ill. 331; *Andrews v. Russell*, 7 Blackf. 474; *Baughner v. Nelson*, 9 Gill, 299; *Perrin v. Lyman*, 33 Ind. 16.

As a general rule, statutes which prohibit or take away a certain defense, not appertaining to the merits, but which arises through some technical or other rule of law invalidating such contracts, are constitutional, and do not impair vested rights: *Lewis v. McElwain*, 16 Ohio, 347; *State v. Newark*, 3 Dutch. 186; *Gibson v. Hibbard*, 13 Mich. 215; *Harris v. Rutledge*, 19 Iowa, 389; *Tilton v. Swift*, 40 Id. 78; *Rich v. Flanders*, 39 N. H. 389; *Stokes v. Rodman*, 5 R. I. 405; *White Water Co. v. Vallets*, 21 How. U. S. 426; *Elliott v. Elliott*, 38 Md. 357; *Kunkle v. Franklin*, 13 Minn. 127; *Coosa River Co. v. Barclay*, 30 Ala. 120; *Grover v. Pembroke*, 11 Allan, 90; *Freeland v. Hastings*, 10 Id. 570; *Schofield v. Wilkins*, 22 Ill. 66; *Baldwin v. Bradford*, 32 Conn. 47; *Waldo v. Portland*, 33 Id. 363; *Simpson v. City Bank*, 56 N. H. 466.

**LAW AFFECTING REMEDY.**—In some cases we find it stated that the remedy is no part of the contract; but as a proposition of law this is not sound. The remedy is certainly a distinctive, and a very essential part of a contract; for the obligation of a contract would rest merely in conscience, were there no remedy; it would be what is termed an "imperfect obligation." What is meant, or should be stated, is that no particular remedy is a part of a contract; and to which a party has a vested right, so that it cannot be altered or modified: *Bronson v. Kinzie*, 1 How. U. S. 311; *Commercial Bank v. State*, 12 Miss. 439; *McMillan v. Sprague*, 4 How. Miss. 647; *Morse v. Gould*, 11 N. Y. 231; *Conkey v. Hart*, 14 Id. 22; *Pratt v. Jones*, 25 Vt. 303; *Coffman v. Bank*, 40 Miss. 29; *Johnson v. Duncan*, 6 Am. Dec. 675; *Robinson v. Magee*, 9 Cal. 84; *Heyward v. Judd*, 4 Minn. 483; *Thayer v. Seavey*, 11 Ma. 284. The obligation of a contract, in the sense in which those words are used, is that duty of performing it which is recognized and enforced by the law, and if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract remains the same no longer: *Curran v. State*, 15 How. U. S. 304; *Green v. Biddle*, 8 Wheat. 1; *Western Savings v. Philadelphia*, 31 Pa. St. 175; *Oatman v. Bond*, 15 Wis. 20; *Riggs v. Martin*, 5 Ark. 506. The principles governing the law on this subject are clearly stated in *Edwards v. Kearzey*, 96 U. S. 595, where it is held the remedy is a vital and material part of the contract, and reference is made to *Von Hoffman v. City of Quincy*, 4 Wall. 535, where it is said: "A statute of frauds embracing pre-existing parol contracts not before required to be in

writing would affect its validity. A statute declaring that the word 'ton' should in prior, as well as subsequent contracts, be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedness may be extinguished by a process of bankruptcy, would involve its discharge; and a statute forbidding the sale of any of the debtor's property would relate to the remedy." And the court show that in each of these cases the obligation of the contract would be violated.

The difficulty in such cases is to determine when the remedy may be altered or modified as not to "materially" impair the obligation. The epithet "material" is vague, uncertain, and calculated to confuse and mislead: *Taylor v. Stearns*, 18 Gratt. 244. Under such a rule, a large discretion is given to decide particular cases on their own facts, for it is evident that the precise point at which laws cease to operate upon the remedy, and begin to infringe upon the obligation of the contract, cannot be governed in most cases by any general rules: *Grimes v. Bryne*, 2 Minn. 89; *Von Baumbach v. Bade*, 9 Wis. 559. However, a few general rules and principles have been adopted, on which many of the cases agree. The remedy may be altered, and yet it may be less efficacious, more tardy and difficult than that subsisting when the contract was made: *Bronson v. Kinzie*, 1 How. 311; *Guild v. Rogers*, 8 Barb. 502; *Jones v. Crittenden*, 6 Am. Dec. 531; *Wood v. Wood*, 14 Rich. 148; *Woods v. Buie*, 5 How. Miss. 285; *Rathbone v. Bradford*, 1 Ala. 312; *Ex parte Pollard*, 40 Ala. 77; *Starkweather v. Hawes*, 10 Wis. 125. So, Cooley says: "It has accordingly been held that laws changing remedies for the enforcement of legal contracts will be valid, even though the new remedy be less convenient than the old, or less prompt and speedy:" *Const. Lim.* 287 *et seq.*, and cases cited.

So, an act may accelerate process, or give a more summary remedy in case of a default in the performance of a contract, and be valid. The legislature is not bound to continue the same forms, and the same system of courts and proceedings for the accommodation of debtors or creditors; the right must be conceded to it to regulate legal proceedings by a general law, as may best promote the administration of justice: *Rathbone v. Bradford*, *supra*; *Stoddard v. Smith*, 5 Binn. 355; *Vanzant v. Waldell*, 2 Yerg. 280; *Livingston v. Moore*, 7 Pet. 469; *Maynes v. Moore*, 16 Ind. 116; *Hopkins v. Jones*, 22 Id. 310; *Webb v. Moore*, 25 Id. 4; *Smith v. Bryan*, 34 Ill. 264; *Templeton v. Horne*, 82 Id. 491; *Frost v. Ilsely*, 54 Me. 345; *Martin v. Hewitt*, 44 Ala. 418; *Baynes v. Commonwealth*, Sup. Ct. Pennsylvania, January, 1879; *Waite, C. J.*, in *Munn v. Illinois*, 94 U. S. 113, 134. On this principle, a statute authorizing an attachment may apply to causes of action existing before its passage: *Cocoa River Co. v. Barclay*, 30 Ala. 120; *Philbrick v. Philbrick*, 39 N. H. 468; *Klaus v. City*, 34 Wis. 623. So, a law taking away the remedy by attachment is valid: *Leathers v. Shipbuilders' Bank*, 40 Me. 386; *Bigelow v. Pritchard*, 38 Mass. 169; *Danley v. State Bank*, 15 Ark. 16. So a law regulating liens may apply to previous contracts and causes of actions: *McCormick v. Alexander*, 2 Ohio, 285; *Curry v. Landers*, 35 Ala. 280; *Daily v. Burke*, 28 Ala. 328; *Evans v. Montgomery*, 4 Watts & Serg. 218; *Swift v. Fletcher*, 6 Minn. 550; *Potts v. New Jersey Arms Co.*, 17 N. J. Eq. 395; *New Orleans v. Holmes*, 13 La. An. 502; *Watson v. N. Y. Central R. R.*, 47 N. Y. 157; *Moore v. Lockford*, 35 Tex. 185, where the principal case is relied on. A statute which requires a party to record an abstract of his judgment within a certain time, so as to preserve his lien, is valid: *Tarpley v. Harmer*, 17 Miss. 310. The right of the legislature to take away retrospectively the liability of

stockholders for debts of the corporation was sustained in *Coffin v. Rich*, 45 Me. 507. But this right is denied in *Hawthorne v. Calf*, 2 Wall. 10.

**LAWS RELATING TO EXEMPTIONS.**—Laws exempting certain property or the person of a debtor from execution, which was not so exempt at the time the contract was made have been sustained: *Oriental Bank v. Freeze*, 18 Me. 109; *Brown v. Dillahanty*, 12 Miss. 713; *Beers v. Haughton*, 9 Peters, 329; *Mason v. Haile*, 12 Wheat. 370; *Sommers v. Johnson*, 4 Vt. 278; *Masey v. Loyal*, 38 Ga. 531; *In re Nichols*, 8 R. I. 50. Cooley says: "Nor is there any constitutional objection to such a modification of those laws which exempt certain portions of a debtor's property from execution as shall increase the exemptions, nor to the modifications being made applicable to contracts previously entered into." Const. Lim. 287. There is however a limit to this right, as appears in *Edwards v. Kearzey*, 96 U. S. 595; *Stephenson v. Osborne*, 41 Miss. 119; *Harvey v. Wickham*, 23 Mo. 112; *Homestead cases*, 22 Gratt. 266; *Lessley v. Phipps*, 49 Miss. 790; *Jones v. Brandon*, 48 Ga. 593. The amount of the exemption may be such as to render a creditor's remedy under a contract nugatory; and thus his right must be essentially impaired: *Kibbey v. Jones*, 7 Bush, 243.

This branch of the subject is considered in Freeman on Executions, sec. 219. The author says: "In many cases the constitutionality of exemptions of personal property has been considered, and so far as our observation extends, has been sustained, unless we regard the decisions of Missouri, upon the statute exempting the property of wives from executions against their husbands." The author shows however that the tendency of the later decisions is against the constitutionality of these exemptions: and quotes the language of Judge Dillon, who says: "On examining anew the decisions of the United States supreme court on the subject of the obligation of contracts, from the earliest down to the latest, we are persuaded that that tribunal will deny the validity of exemption laws as to antecedent obligations." Dillon, J. in note to *Mede v. Hand*, 5 Am. Law Reg. 93.

**LAWS RELATING TO REDEMPTION.**—A statute allowing a creditor to redeem at any time within two years after the sale under a mortgage made prior to the passing of the statute is void: *Grantly v. Ewing*, 3 How. 707; *Howard v. Bugher*, 24 How. 461; *Malony v. Fortune*, 14 Iowa, 417; *Seale v. Mitchell*, 5 Cal. 401; *Robinson v. Howe*, 13 Wis. 341; *Dikeman v. Dikeman*, 11 Paige, 484. The principle in these cases is that a purchaser pays his money under a contract that he shall have title at such time as the law then prescribes; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for the payment or discharge of an obligation under a contract: Cooley, Const. Lim. 291. A contrary doctrine is laid down in *Iverson v. Shorter*, 9 Ala. 713; *Freeborn v. Pettibone*, 5 Minn. 277. So a law which shortens the time for redemption from a mortgage after a foreclosure sale has taken place is void: Cooley, Const. Lim. 291. A clear statement of principles is given in the opinion of Woodbury, J. in *Merrill v. Sherburne*, 8 Am. Dec. 52.

It is held that the right to redeem property sold under an execution pertains solely to the remedy, and the legislature may repeal the statute at any time before it has been availed of by the parties entitled: *Tuolumne Co. v. Sedgwick*, 15 Cal. 515. But the soundness of this view is very doubtful.

It is on this principle that stay laws have been decided to be unconstitutional: See note to *Jones v. Crittenden*, 6 Am. Dec. 531. A statute declaring a judgment void and granting a new trial impairs the obligation of contracts and is void: *Weaver v. Lapsley*, 43 Ala. 224; *Merrill v. Sherburne*, 8 Am. Dec. 52.

**LAWS RELATING TO EVIDENCE.**—The rules of evidence may be changed by a retrospective statute, provided that thereby a cause of action is not destroyed, or a right rendered practically worthless. It is held that laws changing the rules of evidence relate peculiarly to the remedy: *Howard v. Moot*, 64 N. Y. 262; *Rich v. Flanders*, 39 N. H. 304; *Slaughter v. Culpepper*, 35 Ga. 25; *Cutts v. Hardez*, 38 Id. 251; *Cornell v. Dickens*, 11 Wis. 353; *Fales v. Wadsworth*, 25 Me. 553; *Ralston v. Lothian*, 18 Ind. 303. So where the law at the time of sale makes a tax deed *prima facie* evidence of title, a subsequent statute may provide that secondary evidence of the deed shall not be *prima facie* evidence of the regularity of the sale: *Roby v. City*, 64 Ill. 447; see *Hickox v. Tallman*, 38 Barb. 608. A statute permitting either party to give in evidence the consideration and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time, and directing that the verdict and judgment shall be on principles of equity, is valid: *Robeson v. Brown*, 63 N. C. 554; *Rutland v. Copes*, 15 Rich. 84; *Kirtland v. Moulton*, 41 Ala. 548; *Herbert v. Easton*, 43 Id. 547. A statute allowing a municipal corporation to set off a claim for benefits against a claim for damages is valid: *Baldwin v. Newark*, 38 N. J. L. 158.

In *Cooley on Limitations*, 293, it is thus stated: "Where, however, by the operation of existing laws a contract cannot be enforced without some new action of a party to fix his liability, it is competent to prescribe by statute the requisites to the legal validity of such act as it would be in any case to prescribe the legal requisites of a contract to be thereafter made. Thus though a verbal promise is sufficient to revive a debt barred by the statute of limitations or by bankruptcy, yet this rule may be changed by a statute making all such future promises void unless in writing." The author here cites *Joy v. Thompson*, 1 Doug. Mich. 373, and *Kingsley v. Cousins*, 47 Me. 91. The position is held in *Carothers v. Hurly*, 41 Miss. 71, that the legislature has power to change the rules of evidence and establish new ones, as to the sufficiency of proof to take a case out of the statute of limitations, and to apply such new rules to cases arising before their adoption.

**LAWS REGULATING PROCEDURE.**—On the principle already noticed, that the remedy may be altered or modified, laws regulating procedure, as those relating to parties, places, manner of beginning actions, the time to plead, etc., are valid when they have a retrospective operation. Thus a statute enacting that the suit must be brought in the name of the real party in interest, merely affects the remedy and is valid: *Hancock v. Ritchie*, 11 Ind. 48; *Ford v. Hale*, 1 T. B. Mon. 24; *McCreary v. State*, 27 Ark. 425; *Crawford v. Bank*, 7 How. 279; *Graham v. State*, 7 Ind. 470; *Davis v. Central R. R.*, 17 Ga. 323; *Read v. Frankfort Bank*, 23 Me. 318; *Hinkle v. Riffert*, 6 Pa. St. 196; *Hepburn v. Curtis*, 7 Watts, 300; *Van Rensselaer v. Hays*, 19 N. Y. 68. But a statute prohibiting the transfer of *choses in action* and also prohibiting any action thereon after a transfer either in the name of the assignee or the assignor is unconstitutional: *Planters' Bank v. Sharp*, 6 How. 301; *McIntyre v. Ingraham*, 35 Miss. 25; *Grand Gulf R. R. v. State*, 18 Id. 428. The principle on which laws of this character are held constitutional, is clearly stated by Woodbury, J., in *Merrill v. Sherburne*, 8 Am. Dec. 64, 65, where he says: "Nor can the acts of the legislature be opposed to those fundamental axioms of legislation before particularized, unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the state produces amendments or repeals of those laws, those individuals have no

cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee. Thus the right to prosecute actions in a particular time or manner may perhaps be modified or taken away at any period before actions are commenced: 10 Mass. 439." Waite, C. J., in *Mum v. Illinois*. 94 U. S. 134, substantially uses the same language.

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## CURLEY v. DEAN.

[4 Conn. 259.]

**PLEADING CONSIDERATION IN ASSUMPSIT.**—Though in *assumpsit* it is sufficient to state only those parts of a contract, for the breach of which recovery is sought, yet the whole consideration must be explicitly and correctly stated.

**VARIANCE IN ACTIONS ON CONTRACT.**—In an action on a contract, the one set forth on the record and the one proved must agree in substance and effect. And in the case of mutual executory promises, a trivial variation in setting out the contract is fatal.

**CONTRACT MERGED IN AWARD.**—An award is conclusive upon all the facts submitted; and where the subject of the submission is a parol contract, such contract is merged in the award and extinguished.

**ASSUMPSIT.** The first count was on an award, by arbitrators, in favor of the plaintiff and against the defendant upon certain matters in dispute between them, concerning the use and occupation of a clothier's shop and mill owned by the defendant, and concerning books containing accounts for work and labor. The second count alleged the employing of plaintiff in and about the defendant's shop for a certain period, and then averred that in October, 1818, plaintiff and defendant entered into an agreement by which the latter leased to the former, in consideration of one hundred dollars to be paid, the shop, mill and machinery for a term commencing October 8, 1818, and to end at the expiration of the season for dressing cloth, to wit, on the first day of May, 1819; that the plaintiff agreed to employ the defendant's son so long as he should wish to employ him; that for reimbursements for advances and other expenses defendant should look to the book accounts; and that defendant had forcibly expelled plaintiff from the shop on the twenty-fifth of February, 1819, and refused to permit him to have access to the books.

The defendant claimed a variance in several particulars, which appear from the opinion, between the contract declared upon and the one proved.

The jury found for the plaintiff. Motion for new trial.



*Sherman and Bissell*, in support of the motion.

*Daggett and Hamlin*, contra.

HOMER, C. J. The action of the plaintiff is founded on promises made to him by the defendant, in consideration of certain executory promises to be performed on the plaintiff's part. The contract set forth on the record and the one proved must agree in substance and effect. The promise sought to be enforced need not be coextensive with the one actually made, it being sufficient to state so much of the contract only as evinces the engagement on which the plaintiff grounds his action: *Cotterill v. Cuff*, 4 Taunt. 285, 287; *Clarke v. Gray*, 6 East, 564, 567, 568; *Miles v. Sheward*, 8 Id. 7. But except in certain cases on bills of exchange, promissory notes, and other legal liabilities, which liabilities constitute the consideration; although consisting of several parts the consideration must be stated formally and expressly, and the whole of it must be alleged; for if any part of an entire consideration be omitted or misrepresented, the variance on the proof is fatal: 1 Chit. Pl. 295, 296; 1 Phil. Ev. 160; 1 Esp. Dig. 264; *King v. Robinson*, Cro. Eliz. 79; *Miles v. Sheward*, 8 East, 9; *Clarke v. Gray*, 6 Id. 564; *Lansing v. McKillip*, 3 Cai. 286; 13 East, 115, n. c. And if the contract be in the alternative it must so appear on the record: *White v. Wilson*, 2 Bos. & Pul. 119; *Penny v. Porter*, 2 East, 4; *Cooke v. Munstone*, 1 New Rep. 351. In the case of mutual executory promises, those on the one part constitute the entire consideration for those on the other and must be averred. A trivial variation in setting out a contract is fatal; because it does not appear that the promise given in evidence is that on which the plaintiff has declared: 1 Chit. Pl. 304; *Drewry v. Twiss*, 4 T. R. 560.

With these principles in view, I will attend to the objections made to the charge of the court. They relate to certain supposed variances, and to the effect of an award, in respect of which it is claimed, that the court expressed an erroneous opinion. The plaintiff avers in his declaration, that he contracted to employ the defendant's son, so long as he, the plaintiff pleased, and as the defendant contended, it was proved, that he was to employ him for the season. This the court adjudged to be an immaterial variance, but in my opinion, it is of a different character. The promise is alleged to have been entirely dependent for its continuance on the plaintiff's will, while the proof evinces an absolute contract for a determinate

period. Between the averment and the evidence, there is the same difference as exists between an estate for years, and an estate at will.

In his declaration the plaintiff alleges, that the contract made with the defendant was to end at the expiration of the season for dressing cloth, to wit, on the first day of May, 1819. Notwithstanding the time mentioned is under a *scilicet*, it must be deemed a material averment, and if so, its being thus stated will make no difference: 1 Chit. Pl. 807; *Dakin's case*, 2 W. Saund. 291, n. 1. The time specified was to identify the contract, it was matter of description, and no rule of pleading other than the contract must be truly set forth, required it. Its only object must have been to show the termination of the contract, by a certain and invariable limit. According to the proof, the contract was to end with the season for dressing cloth, which was a term as variable as the wind and weather, and entirely dependent on external circumstances. The opinion of the court, that this was an immaterial variance, cannot be supported, as the duration of an agreement is highly essential, and the averment and proof did not concur in the period of its termination.

The judge omitted to instruct the jury, that a variance existed in another particular, on which his charge to them was requested. The plaintiff averred in his declaration, that the defendant was to look to the books for the whole of his pay, and it is contended to have been proved, that the moneys first collected should be thus applied, and resort be had to the accounts for the residue. The variance is material, and the jury to this effect, should have been instructed.

The court correctly decided, that the award stated in the motion was conclusive on all the facts submitted: *Ravee v. Farmer*, 4 T. R. 146; *Smith v. Johnson*, 15 East, 213; *Morris v. Rosser*, 3 East, 15; *Bunnell v. Pinto*, 2 Conn. 431. But this opinion should have been accompanied with an explicit declaration of the legal effect; that is, that the parol contract was merged and extinguished. The jury under the charge must have believed that the contract, instead of being defeated, was conclusively established by the award, and for this reason, the omission of the judge was highly material.

The other judges were of the same opinion.

New trial not to be granted.

## SMITH v. SHERWOOD.

[4 Conn. 276.]

**ESTOPPEL BY JUDGMENT.**—To constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and appear from the record to have been decided. Consequently it is not an estoppel of the plaintiff's title, to produce a judgment rendered in a prior action of disseisin between the parties on the issue of *non disseisin*, it not appearing that the question of title was involved in that action.

**EXHIBITION.** Plea, that the title to the land in fee-simple was in the defendant, and estoppel. The facts constituting the alleged estoppel are stated in the opinion. The case was reserved for the advice of all the judges.

*Daggett and N. Smith, for the plaintiff.*

*Sherwood and Sherman, contra.*

**HOMER, C. J.** It has been contended that the plaintiff must be considered as privy to Salmon; but as this point becomes immaterial in the present case, I shall not discuss it. The defendant pleads, that by law the plaintiff is estopped from denying the title of Ezra and Elijah Seeley, which they acquired by deed from Stephen Sherwood and under which he claims, and from settling up the title of Daniel Salmon.

The following are the facts contained in the defendant's plea so far as it is necessary to state them: The land in question formerly was the property of Stephen Sherwood; and as early as the 5th of July, 1809, he gave a deed of it to Ezra and Elijah Seeley. In September 1814, Daniel Salmon levied an execution upon the land, which issued on a judgment rendered against Stephen Sherwood; and in December 1819, the plaintiff had the premises set off to him on his execution against Salmon. The above-named Ezra and Elijah Seeley in January 1819, conveyed the land in question to the defendant. In the year 1815, Salmon brought an action of ejectment against the said Seeleys and the defendant, claiming the premises and under the plea of no wrong and disseisin, the jury found the issue in favor of the defendants, and judgment was rendered accordingly.

Passing here, for the present, it is too clear for controversy, that the preceding verdict and judgment on the facts aforesaid are neither a bar to the plaintiff's claim nor pleadable by way of estoppel. The plaintiff's action is founded on a disseisin

many years subsequent to the aforesaid judgment, and of consequence the judgment can be no bar, as it was not for the same matter, cause and thing; neither can the record be an estoppel to the plaintiff's demand as the ground of determination does not appear. The defendants, it was found, did not disseise Salmon, and the verdict may have been rendered upon the fact that they had not been in possession of the premises, or that they had possessed by license from the plaintiff; or for other reasons which never involved the validity of his title. It is impossible to say upon the inspection of the record only, that the title of Salmon was ever drawn in question. The estoppel, if there be one, must be founded on the averment of the defendant in his plea, that the title of Salmon was the only subject of determination. This raises a novel question of which no trace is to be found in the books and has given birth to the inquiry, whether an estoppel may be created, by parol evidence helping out the record.

I have already intimated what again I repeat, that the attempt of the defendant is a perfect novelty, not countenanced, so far as I have knowledge, by a single determination. An estoppel is a plea not favored in law, because it precludes an inquiry into the truth; and for this reason it requires a technical accuracy, which is not liable to the most subtle and scrupulous objection: *Dovarton v. Payne*, 2 H. Bl. 530; *The King v. Lyme Regis*, Doug. 159; Com. Dig., tit. Estoppel, E. 4; Co. Lit. 352, b. A person may conclude himself, or become estopped by his own act or acceptance, which is not this case; or by a record which demonstrates the truth on its face, and the ground of it is, that "'tis reasonable that some evidence should be allowed to be of so high a nature as to admit of no contradictory proof:" 3 Co. Lit., Butler's note, 306. For the same reason, a person is estopped by a writing; as, if a condition in a bond recites that there are divers suits in B. R., the obligor has precluded himself from saying that there are no suits there: *Willoughby v. Brook*, Cro. Eliz. 756; 4 Com. Dig., tit. Estoppel, A, 2. But if the writing is defective in any particular, it cannot be supplied by parol proof: *Parkhurst v. Van Cortland*, 1 Johns. Ch. 281 [7 Am. Dec. 427]; much less would the parol evidence, if it were admissible, be conclusive.

There is no doubt that letters-patent, fines and recoveries, deeds enrolled, and other records, created an estoppel, and for this incontrovertible reason, that the matter working the estoppel appears upon the face of them. It is equally indis-

putable, that every fact which the record in a suit demonstrates with incontestible certainty, if it be aptly pleaded by the party who has right to avail himself of it, is absolutely conclusive. But the record must evince the fact beyond contradiction.

The question before the court is clearly settled by the case of *Outram v. Morewood*, 3 East, 346. The principle there recognized and established was this; that if a verdict find any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel, in another action between the same parties, or their privies, in respect of the same fact or title. The opinion of the learned and able judge in the case just cited, declares in opposition to what had been contended for by the defendant, that there is no difference in relation to an estoppel, between an action of trespass and an action of higher degree. "A recovery in any one suit upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title:" p. 354. The reason is both obvious and indisputable. "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel:" p. 355. "The recovery, of itself, in an action of trespass (and likewise in action of disseisin), is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which having once been distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined, solemnly found against them."

To constitute an estoppel, the issue must be taken on a precise point, and this point necessarily will be found one way or the other, by the verdict. The question whether a person is precluded from again litigating a point or fact, resolves itself into an inquiry concerning "the effect of a precise allegation made in pleading on record, and tried and found between the parties." If there be such an allegation upon which issues have been taken and found, it conclusively estops further controversy on the point established. In the case of *Sir Everick Evelyn v. Haynes*, which was a second action for obstructing a water-course, tried before Lord Mansfield upon a plea of not guilty, and where a verdict for the plaintiff in another action brought against the defendant for another obstruction to the same water-course, was given in evidence that learned judge held, and very properly, said Lord Ellenborough; 3 East, 365, that the plaintiff had not obtained such a determination of right

by the former verdict as the law considers conclusive. It could not be pleaded by way of estoppel, no issue having been taken on any precise point.

Undoubtedly, in the action of Salmon against the Seeleys and the defendant, it might have been proved to the jury that the plaintiff had no title; but this possibility is of no consequence. It devolves on the defendant to show that they actually did find this point; and this alone can be proved by the record. In *Sintsenick v. Lucas*, 1 Esp. 43, it was decided by Lord Kenyon, that "in order to make a record evidence, to conclude any matter, it should appear that that matter was in issue; which should appear from the record itself, nor should evidence be admitted, that under such a record, any particular matter came in question."

The same point was explicitly determined in *Manny v. Harris*, 2 Johns. 24 [3 Am. Dec. 386]; and in *Church v. Leavenworth*, 4 Day, 274, before this court there was a decision precisely to the same effect. "To make a verdict evidence," said Swift, J., "it must appear from the record that the same point was directly in issue between the parties in the former case, and was found by the jury." And by Baldwin, J., it was said, "To make a record conclusive, or even admissible evidence, it must appear from the record offered that the fact now in issue was by the former trial directly decided." The case of *Kitchen v. Campbell*, 3 Wils. 304, cited by the defendant with others decisive of the same question; *Rice v. King*, 7 Johns. 20; *Johnson v. Smith*, 8 Id. 383, having no bearing on the point under discussion. They proceed on this just and necessary principle, that you shall not bring the same cause of action twice to a final determination; and for the purpose of showing that the record relates to the same subject-matter, that you may adduce evidence. The question here is, not what does the record prove, but to what did it refer; and if this inquiry were not permitted, no recovery would be conclusive, unless the declaration contained, what is barely possible, an infallible description of the thing in controversy.

I conclude, that so far from there being an estoppel arising from the facts contained in the defendant's plea, the record relied upon is clearly inadmissible in evidence, as it does not prove the point for which recurrence has been had to it. The defendant is bound to establish the proposition, if he would support his plea that parol evidence may not be contradicted; for disguise it as we may, this is the bald and naked principle involved in the defense. The record proves nothing, and unless

the averment, sustainable alone by parol testimony, has the preclusive effect of an estoppel, what is the defendant's case?

BRAINARD, J., concurred.

BENTOL, J., delivered an opinion favoring the sufficiency of the plea. PETERS, J., concurred.

CHAPMAN, J., being interested, expressed no opinion.

Plea insufficient.

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## BOUND v. LATHROP.

[4 Conn. 333.]

**ACKNOWLEDGMENT BY JOINT DEBTOR.** The acknowledgment by one of several makers of a joint and several promissory note takes it out of the statute of limitations as against the others.

**ACTION** on a promissory note payable on demand, made by Bound and Sampson, jointly and severally. Bound pleaded *non assumpsit infra sex annos*, the other defendant defaulted. The only question in the case was whether a promise by Sampson within six years would remove the bar as to Bound. Verdict for the plaintiff and error to this court.

*Sherman and Stanley*, for the plaintiff in error.

*Hotchkiss*, contra.

HOSMER, C. J. At the trial of this cause before the court below, evidence was exhibited to prove that Daniel Sampson, one of the makers of the note in suit, within six years next before the commencement of the plaintiff's action, acknowledged it to be justly due. The legal effect of this testimony, by reason of a disagreement between the judges on the point, was not declared to the jury; but from the verdict it is indisputable that they considered it to be a waiver of the statute of limitations. If they assumed the principle of law correctly, no error has intervened.

It is well established by a course of decisions, that an acknowledgment of the existence of the debt within six years before the suit is brought upon it, unaccompanied with a protestation against making payment, is evidence sufficient for the jury to presume a new promise, and repels the statute of limitations: *Lord v. Shaler*, 3 Conn. 131 [8 Am. Dec. 160]; *Halliday v. Ward*, 3 Campb. 32, and the cases in the note to Howe's edition. And whether the recognition of debt was before six years had elapsed after the cause of action arose, or afterwards, is of no consequence, as it is the uniform effect of it to subvert the principle of presumed payment, the basis on which the statute is founded.

An admission of debt by one copartner, during the continuance of the partnership, or by one joint contractor in relation to the contract, is competent proof against all: 1 Phil. Ev. 72, 73; *The King v. Hardwick*, 11 East, 589; *Vicary's case*, Gilbert Ev. 1; *Lucas v. De la Cour*, 1 Mau. & Sel. 249; *Wood v. Braddick*, 1 Taun. 103; *Grant v. Jackson*, Peake, 203; *Walden v. Sherburne*, 15 Johns. 409. The declarations of a joint contractor, in respect of the contract entered into, are equally admissible as those of a partner, for in regard to the joint debt they have placed themselves virtually in this relation: *Bostwick v. Lewis*, 1 Day, 33 [2 Am. Dec. 73]; *Howard v. Cobb*, 3 Id. 309; *Whitcomb v. Whiting*, Doug. 629; *Jackson v. Fairbank*, 2 H. Bl. 340.

It is unnecessary to enter further into the argument, as the point before the court, so far from possessing novelty, has received frequent and uniform determinations. In *Whitcomb v. Whiting*, Doug. 629, decided as far back as the year 1781, it was adjudged that the acknowledgment of one out of several makers of a joint and several promissory note takes it out of the statute of limitations as against the others. "Payment by one," said Lord Mansfield, "is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." The point was afterwards determined in the same manner in *Jackson v. Fairbanks*, 2 H. Bl. 340, and it is entirely at rest in Westminster Hall. In the state of New York a similar determination was made in *Smith v. Ludlow*, 6 Johns. 267, and the adjudication was followed up in the recent case of *Johnson v. Reardslee*, 15 Id. 3. And although the same decision was not directly made in *Clementson v. Williams*, 8 Cranch, 72, it is fairly to be implied, the principle not having been questioned by the court, but the acknowledgment being declared to be insufficient. Not a determination has been made, so far as my knowledge extends, impugning the principle of the decisions before mentioned, except the ancient case of *Bland v. Hasebrig*, 2 Vent. 151, adjudged in 1 and 2 of William and Mary, which case was overruled in *Whitcomb v. Whiting*, and since has been uniformly considered not to be law.

The case under discussion was determined correctly, and there is no error in the decision.

The other judges were of the same opinion.

Judgment to be affirmed.



## MAPLES v. WIGHTMAN.

[4 Conn. 376.]

**CONTRACTS OF INFANT—SURETY.**—Contracts made by an infant against his interest are void. Accordingly where an infant executed a promissory note as surety, such contract is against his interest and void.

Action on a promissory note alleged to have been made by the defendant jointly and severally with another in the town of Norwich. It was proved that defendant was a minor at the time the note was made and that the defendant signed the same without the limits of Norwich. The evidence of a promise by the defendant after arriving at age, to show that he had promised, within the limits of Norwich, to pay the note, was rejected, and a verdict directed for the defendant.

Verdict accordingly and motion for a new trial.

*Goddard and C. Perkins*, for the motion.

*Gurley and Hill*, contra.

HOMER, C. J. The plaintiff has declared on a promissory note, made in the city of Norwich, and under the plea of *non-assumpsit*, it appeared to have been executed by the defendant, when an infant under the government of a guardian, and at Borrah, without the said city, and as the surety of Elisha Wightman. The declaration of the plaintiff would have been insufficient, unless it had contained the averment, that the note was executed within the city of Norwich: *Wooster v. Parsons*, Kirby, 27. On a point so perfectly familiar as this, all argument is superfluous. It has often been established by direct decision, and rests likewise on the invariable practice and universal understanding of nearly forty years continuance. By the plea of *non-assumpsit*, the plaintiff's averment was traversed, and the burden of proof according to the general principle of evidence, devolved on him who took the affirmative of the issue. The allegation that the note was executed in the city of Norwich, was disproved; and hence the city court had no jurisdiction. The adjudication of this point settles the case conclusively against the plaintiff.

Much controversy has existed at common law relative to the contracts of infants; whether under given circumstances they are void or voidable but the diversity of opinion on this question subsisting between enlightened jurists, I do not feel myself called on to discuss. The statute on this subject provides, "that no person under the government of a parent, guardian or master, shall be able to make any contract or bargain, which

in the law shall be accounted valid:" Tit. 107, s. 2, p. 487, ed. 1808. In the case of *Alsop v. Todd*, 2 Root. 109, the court considered the above statute, to use their expression as raising the common law, and rendering absolutely void, all contracts made within its prohibition. In *Rogers v. Hurd*, 4 Day. 57 [4 Am. Dec. 182], the construction of the statute came a second time under review; and the court again decided, that all contracts made by infants against their interests were void. In delivering their opinion, they say: "It cannot be supposed that the legislature intended to introduce regulations, merely in affirmation of the common law. What was then their intent in passing this law? It is evident that they did not intend to deprive infants of the power of making contracts for their benefit, nor did they mean, by using the expression 'accounted valid,' to leave their contracts as to their being void or voidable on the same footing as at the common law. They must have contemplated contracts not for their apparent benefit; and their object must have been to render them incapable of making such contracts. Though the term 'accounted valid,' may be satisfied by considering them voidable only, yet it is evident, that the legislature intended by this phrase, to enact, that the contracts of infants should be absolutely void, for such would be the common understanding of the term; and there could be no reason for making the law unless such was the meaning of it; for otherwise the statute has no effect and leaves the matter as it was before at common law. Such has ever since been the general understanding of courts, respecting the construction of this statute." Again: "The plain principle is that all contracts made by infants against their interest are void; and that all with the semblance of advantage are voidable."

These concurring determinations of the supreme court, have established the law beyond dispute, and subjected the contract sued upon to the test of a simple inquiry; is the contract opposed to the interest of the infant, or has it a semblance of advantage in his favor? On this subject who can entertain a doubt? The infant could derive in any event no possible benefit from the agreement. He was a surety only; and while incapable of governing his own concerns and placed under the tutelage of another, he is entangled in a measure of no profit, but of undoubted hazard. The contract is unquestionably void to all intents and purposes.

The other judges were of the same opinion.

New trial not to be granted.

## ALDRICH v. KINNEY.

[4 Conn. 390.]

**JUDGMENT OF ANOTHER STATE—JURISDICTION.**—In order that a judgment obtained in another state should be conclusive and unimpeachable in every other state, the court pronouncing the judgment must have had jurisdiction; and such judgment is of no validity where the person had no legal notice to appear, and where, in fact, there was no appearance.

**EVIDENCE OF WANT OF JURISDICTION.**—Although the record of such judgment states the appearance of the defendant by his attorney, evidence is admissible showing that he had no legal notice and did not appear.

DEBT on a judgment recovered against defendant in the supreme judicial court of Rhode Island. The defendant pleaded that he had never been personally served with process in the action in Rhode Island; that he had never been an inhabitant of that state, and that at the time of the rendition of the judgment he was, and ever since has been, an inhabitant of this state. Plaintiff replied that defendant had been legally served according to the laws of Rhode Island, and had appeared by attorney. Evidence offered by the defendant to prove his plea in bar, and that he had never authorized any attorney to appear for him, was rejected, and verdict given for the plaintiff. Motion for a new trial.

*Goddard*, in support of the motion.

*Daggett and J. Williams*, contra.

HOSMER, C. J. Foreign judgments are *prima facie* evidence of debt, and to be presumed just until the contrary is proved; but if they are shown to be unjust or irregular, a suit upon them will not be sustained: *Walker v. Witter*, Doug. 1.

The judgment of a court of a sister state is not to be placed on the same footing of a foreign judgment, but has all the validity provided by the constitution of the United States. The first section of the fourth article of that instrument declares "that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." By the above terms of the constitution, complete and plenary provision was made, giving to judgments duly rendered in either state conclusive and unimpeachable validity in all the states. If by the expression,

"full faith and credit," it was only intended to place the judgments duly rendered in the respective states on the same foundation with foreign judgments, where the common law had placed them, the enactment would be idle, and beneath the valuable instrument containing it. From the political connection between the states, and the principles of courtesy and mutual confidence, applicable to the friendly relations subsisting between them, it is reasonable to infer that more respect was intended to be paid to the adjudications of their courts than to those of foreign nations.

The result to which I have come in the case before the court, renders a particular discussion of this point unnecessary; and equally so has it been made by the harmonious opinions of several respectable judiciaries, and more particularly by the adjudications of the supreme court of the United States on the matter in question. That a judgment duly rendered before the courts of one of the United States is conclusive in another, was adjudged by the circuit court of the United States, in the case of *Armstrong v. Carson*, 2 Dall. 302. To the same effect were the decisions of the supreme court of the United States in *Mills v. Duryee*, 7 Cranch, 481, and in *Hampton v. McConnell*, 3 Wheat. 234. Similar determinations were made by the supreme court of Massachusetts in *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88], and in *Jacobs v. Hull*, 12 Id. 25. In North Carolina, South Carolina, and New Jersey, judgments to the same effect have been rendered: *Wade v. Wade*, Cam. & N. 486; *Coleman v. Guardians of Negro Ben*, 2 Bay, 485; *Curtis v. Gibbs*, 1 Penn. 899; and a like adjudication was had by the supreme court of the state of New York, in the case of *Andrews v. Montgomery*, 19 Johns. 162, *post*; and similar determinations were made by the superior court of this state in *Kibbe v. Kibbe*, Kirby, 124, and *Smith v. Rhoades*, 1 Day, 168.

Admitting as I do most fully, that a judgment rendered in a sister state, by a court which has jurisdiction of the subject-matter and parties, is conclusive and unimpeachable; I am equally clear that where the defendant neither appeared nor had legal notice to appear, a judgment against him is invalid, and ought not to be enforced. So far as my knowledge extends, no decision has been had giving validity to a judgment under the circumstances last mentioned. The cases of *Mills v. Duryee*, 7 Cranch, 481, and *Hampton v. McConnell*, 3 Wheat. 234, have no relevancy to the point under discussion. In both these cases, the defendants were within the jurisdiction of the courts whose

judgments were questioned, and having had notice to appear, they in fact appeared and made defense. The courts did not, nor could they, express an opinion on the present point of inquiry, unless they traveled out of the record. In *Hitchcock v. Aiken*, 1 Cai. 460, the judges Livingston and Thompson, after having admitted the conclusiveness of judgments when duly rendered, expressed decisive opinions on the point now under discussion.

Speaking of determinations without personal summons or arrest, it was said by Livingston, J.: "Perhaps we possess the power, and I think we do, in extraordinary cases, and where it is manifest the proceedings have been *ex parte*, of considering them as exceptions to the general law, and as not contemplated by the constitution. Now no violence is done to my understanding of this article in the constitution, in saying that it does not embrace a judgment which has been rendered against a party to whom no opportunity was offered of contesting his adversary's demand, and who, instead of being defended by himself or by counsel of his own choice, has no other representative than an old blanket or a log of wood. A sentence thus determined, in defiance of the maxim '*audi alteram partem*,' deserves not the name of a judgment." "I think," said Thompson, J., "the rule laid down by the court in the case of *Kibbe v. Kibbe*, above cited, is founded in justice and good sense; that the judgments of courts in sister states ought to receive full credence where both parties were within the jurisdiction of the court at the time of commencing the suit, and were duly served with process, and had, or might have had, a fair trial of the cause."

In *Kilburn v. Woodworth*, 5 Johns. 41 [4 Am. Dec. 321], which was an action of debt on a judgment recovered against a person in the state of Massachusetts, domiciliated in the state of New York, it was adjudged that the suit could not be sustained. "To bind a defendant personally by a judgment, said one of the judges, when he was never personally summoned, nor had notice of the proceeding, would be contrary to the first principles of justice." This determination had been followed by similar decisions in the same court in *Robinson v. Ward*, 8 Johns. 86 [5 Am. Dec. 327]; *Fenton v. Garlick*, 8 Id. 194; *Pauling v. Wilson*, 13 Id. 192; *Borden v. Fitch*, 15 Id. 121 [8 Am. Dec. 225].

In the state of Massachusetts the subject underwent a very able discussion by the late learned Chief Justice Parsons, in

*Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]. "Neither our own statutes," said he, "nor the federal constitution, nor the act of congress, had any intention of enlarging, restraining or in any manner operating upon the jurisdiction of the legislatures, or of the courts of any of the United States. The jurisdiction remains as it was before, and the public acts, records, and judicial proceedings, contemplated, and to which full faith and credit are to be given, are such as are within the jurisdiction of the state, whence they shall be taken. Whenever, therefore, a record of a judgment of any court of any state, is produced as conclusive evidence, the jurisdiction of the court rendering it, is open to inquiry; and if it should appear that the court had no jurisdiction in the case, no faith or credit whatever will be given to the judgment. In order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction, not only of the cause, but of the parties." In this opinion the other judges concurred, and the decision has been followed by a similar determination in *Jacobs v. Hull*, 12 Mass. 25. In the state of Connecticut judgment to the same effect, was given by the superior court in *Kibbe v. Kibbe*, Kirby, 124, succeeded by the case of *Smith v. Rhoades*, 1 Day, 186, in the adjudication of which the same point, although not expressly adjudged, is clearly implied.

These uniform and concurring opinions of the most respectable and learned judges, are entitled to the highest deference. The principle involved in them is fully sanctioned by the determinations in Westminster Hall. In *Fisher v. Lane*, 3 Wils. 197, it was said by Lord Ch. J. DeGrey, when speaking of the supposed default of a Mrs. Fisher, that "She made no default, for it appears she never was summoned or had notice, which is contrary to the first principles of justice." And in *Buchanan v. Rucker*, 9 East, 192, the court adjudged that the law will not raise a promise upon a judgment obtained by default against a person in one of the colonies who was summoned only by nailing a copy of the declaration on the court-house door.

Independent of decisions, on the foundation of principle only, I can entertain no doubt relative to the construction of the constitution of the United States. In expounding this instrument adherence must not be had to the letter, in opposition to the reason and spirit of the enactment; and hence, to effectuate the object intended it is even proper to deviate from the usual sense of the words. Where they admit of different intendments, that

must be selected which is most consonant to the object in view. Every interpretation which leads to an absurdity ought to be avoided; and that is properly denominated absurd which is morally impossible, or so contrary to reason that it cannot be attributed to a man in his right senses. "When rights are infringed," said C. J. Marshall, "while fundamental principles are overthrown, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects." The words "full faith and credit shall be given in each state to the records and judicial proceedings of every other state," do not comprise that unquestionably clear and definite expression of intention which precludes construction. The most plenary faith and credit, undoubtedly, must be given; but the sole difficulty consists in precisely ascertaining the subject of this confidence.

What is intended by "the records and judicial proceedings of every other State?" The words are sufficiently comprehensive to embrace every judgment in fact; and, on the other hand, they may rationally be satisfied by a limitation to such judgments only as are duly rendered by a court of competent jurisdiction against those who appeared to defend or who were legally notified to appear. To adopt the former construction were unreasonable and absurd. A more preposterous proposition cannot be advanced; one more contrary to reason and justice; more injurious to the absolute rights of man, or to fundamental principle, than that a person shall be invincibly bound by a judgment obtained against him without notice. *Audi alteram partem* is a maxim equally just and indisputable; and when from this acknowledged principle there is a departure, if estate is thereby subjected to an *ex parte* judgment, the right of property is violated, and if the body is plunged in a prison the more important right of personal liberty is destroyed. It cannot reasonably be presumed that it was intended, by the constitution of the United States, to effectuate such glaring injustice; nor is there any reason to believe it derived from the phraseology of that valuable instrument. To the expression "the records and judicial proceedings," annex the just and reasonable limitation before mentioned, that they are such and such only, as are duly rendered by a court of competent jurisdiction against those who appeared to defend, or who were legally notified to appear; and while the absurdity of a more comprehensive provision is avoided, there is scarcely a departure from the popular meaning of the words. The qualification alluded to, is a necessary *subintelli-*

*gitur*, to reach the just meaning of the constitution, and avoid construction too unreasonable and oppressive for a moment to be admitted.

No sufficient objection arises from the expression in the record that the defendant appeared by his attorney. The attention of the court is seldom if ever called to the inquiry, unless specially directed to it, whether a person claiming to be the attorney of the party is really such; and the record by the management of the plaintiff, need never be destitute of this affirmation. In *Robson v. Eaton*, 1 T. R. 62, Lord Mansfield permitted the defendant to show that the person declared in the record in a former case to be his attorney, was not his attorney. "The record of the common pleas," said he "amounts to no more than this: that the attorney prosecuted the suit in the plaintiff's name."

In conclusion, I am unhesitatingly of opinion that the testimony offered by the defendant in this case, should have been received. So far as relates to the property said to be attached in the state of Rhode Island, the proceeding was *in rem*; *Phelps v. Holker*, 1 Dall. 271; *Kilburn v. Woodworth*, 5 Johns. 37 [4 Am. Dec. 321]; *Pauling v. Wilson*, 13 Id. 132, but as against the defendant, if he was not notified to appear and did not appear and defend, the judgment rendered against him is of no validity.

The other judges were of the same opinion.

New trial granted.

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See the examination of this subject in note to *Bartlet v. Knight*, 2 Am. Dec. 36.

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## TREAT v. BROWNING.

[4 Conn. 408.]

**VARIANCE IN SLANDER.**—The words charged were that "the plaintiff had had a bastard child;" and the words proved were: "If I have not been misinformed, the plaintiff had a bastard child." It was held no variance.

**EVIDENCE IN MITIGATION.**—Reports in circulation that the plaintiff had been guilty of the crime charged, may be given in evidence by the defendant as evidence of character to mitigate damages.

**EVIDENCE TO JUSTIFY NOT ADMISSIBLE.**—Evidence on the general issue without notice, for the purpose of mitigating damages, which amounts to a justification of the charge, is not admissible.

**SLANDER against Browning and his wife Catharine.** The declaration laid the words as spoken by the defendant Catharine



of the plaintiff Eliza S. Treat, and as follows: "She had a child in the city of New York, and her father is supporting it." "She has been guilty of fornication and has had a bastard child." "She was pregnant with a bastard child; and was, by her parents carried away from home for the purpose of concealing her pregnancy and the birth of the child, of which she was delivered in the city of New York; and I have seen a man in New York who has seen the child and the child is supported by her father, Amos Treat." General issue pleaded, without notice of justification. The defendant, to prove that the words were not spoken in the same sense and manner as alleged, introduced testimony to the effect that Catharine had said: "If she had not been misinformed, Eliza Treat had a child," etc, and that she said: "I do not know the truth of it, but that is what they do say." But the witness who testified to the uttering the words in this manner, further testified that Mrs. Browning was very angry when she spoke them, and seemed desirous of having them gain belief. The judge refused to instruct the jury that the words proved did not support the declaration.

The defendants offered to prove that Mrs. Browning was not the author of the story concerning plaintiff, but that it was matter of common report. The presiding judge rejected such evidence, except for the purpose of establishing the bad character of the plaintiff. The defendant then went into consideration of the various reports unfavorable to the character of the plaintiff for chastity.

To mitigate the damages defendants offered certain evidence, which appears from the opinion, this evidence was not admitted. The defendants endeavored to impeach the character of Bill, one of the plaintiff's witnesses, by the testimony of Parks, who swore that Bill's character was not on a par with that of mankind in general. On the cross-examination, Parks was asked whether he had not, two years before, given a certificate of Bill's good character for truth. The question was objected to and ruled out. The defendants then offered to prove that, subsequent to speaking the words and before this action, Catharine held a conversation with plaintiff's father, in which the author of the report was told, and from whom she heard it. The evidence was rejected.

Verdict for the plaintiff for one thousand dollars damages; motion for a new trial.

*Daggett and Lanman*, in support of the motion

*Goddard and Brainard*, contra.

HOSMER, C. J. The plaintiff's declaration contains three sets of words of precisely the same import, each of them in substance, comprising the charge of fornication.

1. One Davis, a witness adduced by the defendants, testified to the speaking by Catharine Browning of the words alleged with the prefatory expression: "If I am not misinformed." The source from whence the imputation originated, whether from the wicked imagination of the speaker, or by information derived from others, has no materiality on a question which respects the meaning of the words published. If a person utter of another, "She is a prostitute," or "If I am not misinformed, she is a prostitute." The essential charge, in both instances, is constructively the same, or this unhappy consequence must inevitably result, that, by a mode of phraseology which indicates that the person speaking had heard the crime imputed, slander might be propagated with impunity. If this were not the legal construction, malice would not desire, nor could it devise, a better shield of protection from suit for the publication of the most wanton calumny. The point in question has been long and uniformly settled, so that, on this subject, no doubt can or ought to exist: *Herle v. Osgood*, 1 Vent. 50; *Petersborough v. Mordant*, 1 Lev. 277; *Stich v. Wisdom*, Cro. Eliz. 348; *Sydenham v. Man*, Cro. Jac. 407; *Oldham v. Peake*, 2 Bl. Rep. 759; *Peake v. Oldham*, Cowp. 275; *Miller v. Miller*, 8 Johns. 74.

2. In mitigation of damages, the defendants offered evidence of general reports that the plaintiff had committed the alleged crime, which the judge admitted, but as proof only of character. It is now insisted that by this common fame or reputation, for it was nothing more, the charge of fornication was proved; and that the restriction under which the testimony had been received was incorrect. To this argument it may be conclusively replied, that if the evidence went beyond the proof of reputation, it should have been rejected, as there had been no notice of the intended justification: *Bailey v. Hyde*, 3 Com. 463. The discrimination of the court, however, was sound, by admitting reports to have all the efficacy they possess. They are hearsay, only, and evincive of character, which alone is susceptible of evidence founded on the opinions of men; but specific facts are established by testimony founded in knowledge, and not on common fame. On a critical examination, it is apparent that the cases which have sanctioned the admission of general reports have not gone beyond these bounds: *Leicester v. Waller*, 2 Campb. 251; — *v. Moor*, 1 Mau. & Sel. 285.

3. The court rejected testimony offered to prove in mitigation of damages that prior to the publication of the words by the defendant, Catharine, she had heard them from a Mrs. Browning; and this has given rise to another objection. The cases which have been decided on this subject do not harmonize; but the preponderance of the determinations, in my judgment, is against the admission of the proffered testimony. In *Leister v. Smith*, 2 Root, 24, hearsay was admitted in mitigation of damages; but from the very brief report of the case, comprising neither the argument, the ground of decision, nor the citation of any authority, it was obviously too little considered to establish a doctrine of great practical importance. And in *Morris v. Duane*, 1 Binn. 90, in a case at nisi prius before Tilghman, C. J., it was adjudged that in mitigation of damages, the defendant might prove that he did not originally devise a libel of which he was the publisher.

On the other hand, in *Miller v. Spencer*, 1 Holt, 534, evidence of the above description, offered by the defendant, was repelled by Gibbs, C. J., who observed in giving his opinion, that "If an action be brought against A. for calling B. a thief, it is no defense for A., under the general issue, to prove that he was told so by C. A. is answerable for the full measure of his slander." To the same effect was the determination in *Wolcott v. Hall*, 6 Mass. 514 [4 Am. Dec. 173], and in assigning the reasons, it was said by Parsons, C. J.: "The plaintiff could have no notice from the pleadings to meet this evidence, and when regularly seeking redress for an injury from the defendant, he might be overwhelmed by particular scandal, which could not be traced to any author, or if it could, might be disproved." In *Kennedy v. Gregory*, 1 Binn. 85, the same opinion was embraced by two judges out of three, although from the special circumstances of the case the testimony was admitted. "I challenge," said Smith, J., "ingenuity to point out one evil which would result from such evidence being given as matter of justification, without notice, which would not follow, to almost the same degree, were it allowed in mitigation of damages," and I am incapable of resisting the same conclusion.

When I consider the case on principle, I am strongly impelled to the opinion that the offered testimony was rightly rejected. The argument for its admission proceeds on the ground that the evidence would diminish the presumption of malice, and of consequence lessen the damages. It is an indisputable truth, that evidence which falls short of a justification,

may be competent to mitigate damages, and that to this end, such facts and circumstances as show a ground of suspicion, not amounting to actual proof of guilt, are admissible in evidence: *Knobell v. Fuller*, Peake's Ev. 287, 288. But the case supposed is not the one on trial; for the declaration of Mrs. Browning, which occasioned one of the defendants to publish the words in suit, are not "facts or circumstances which show a ground of suspicion," within the meaning of the above determination. It likewise must be admitted, that facts which tend to diminish the presumption of malice are sometimes competent proof, and by the defendant it is imagined that they always are, but this supposition is evidently unfounded. Malice undoubtedly is an essential ingredient in an action of slander, and in all cases where the degree of this property of the mind appears in evidence, it will affect the damages.

But the question now under discussion is not what is the effect of evidence when lawfully admitted, but it is whether mere hearsay, of which the plaintiff had neither notice, knowledge, nor anticipation, is competent testimony, because, if received, it will lessen the presumption of malice. Common sense and natural justice speak a very different language. If the defendant had published of the plaintiff that she was a strumpet, he could not, in mitigation of damages, prove her to be a thief; or if he had charged her with being a procuress, he might not show that she was a prostitute. So, if arson had been imputed, it would be incompetent testimony that the plaintiff was a drunkard, or a gambler, or a forger of bills, or a perjured woman: *Hilsden v. Mercer*, Cro. Jac. 677; *Smithies v. Harrison*, 1 Ld. Raym. 727; Bull. N. P. 9; *Andrews v. Van Duser*, 11 Johns. 38. Now in all the cases put, the imputation of criminal misconduct being pointed at a person of notorious profligacy, would be less indicative of malice, or wickedness (its legal acceptance: *Rex v. Oneby*, 2 Ld. Raym. 1487), than if it had been referred to one of irreproachable conduct. It cannot, therefore, be a correct principle, that evidence which diminishes the presumption of malice is always admissible. But that it should be received when it does not operate as a surprise on the plaintiff, and take him unprepared, is, in my opinion, a rule perfectly rational and just. This principle will impart to a person who has injured another by the utterance of slander, all the defense which can be desired, compatibly with that protection of character which ought ever to be a primary object, and on the other hand, it will secure the administration of justice

to the plaintiff, who has been maligned by false and unwarrantable representations.

The case of *Maybee v. Avery*, 18 Johns. 352, has been thought to establish a different principle, but the question there decided is misconceived. Under special notice of justification, evidence which fell short of proving the truth of the words spoken, was permitted to be taken into consideration in the estimate of damages. The testimony having been legally admitted it was fit that it should be made effectual to every legitimate purpose. But the question in that case, was on the effect of lawful testimony; in this it is, whether the evidence offered is lawful and of consequence admissible. The precise diversity lies between the weight of testimony and the propriety of its reception, and the object of determination has no unity in the two cases, but a marked and essential difference. Now, that the defendant heard the slander in question from a Mrs. Browning, was not within the issue, nor could it have been anticipated as the unqualified charge made on the plaintiff was, that she had committed a direct act of fornication. The offered proof was a surprise on the plaintiff, which she could not have been prepared to repel, however repellible it might have been, and the admission of such testimony would evince a wanton disregard of reputation, one of the first of human blessings. It is by far more just, that the defendant, Catharine, who made an unqualified charge on the plaintiff by a direct affirmation, and on her own personal credit, thus virtually assuming the responsibility of it, should, as was very expressively said by Chief Justice Gibbs, "be answerable for the full measure of her slander."

4. The defendant offered to prove, in mitigation of damages, that before the words charged were spoken, "the plaintiff had frequently left her bed in her father's house, in the night season, and lodged in a bed with a young man in an adjacent store; that she had been detected in a wanton and lascivious situation with the same young man, in a secret place in a field among broom-corn, and at another time, in a similar situation on a hay-mow." I will select one objection only, against the admissibility of the testimony offered. The above facts, by a strongly probable presumption, establish the truth of the words alleged. The forsaking of her own bed, at midnight, and going to that of a young man in an adjacent store, and lodging with him, the wanton and lascivious situation in a corn-field, and on a hay-mow, with the young man, lead to the same conclusion. If any thing short of this were intended to have been done in those

places of secrecy and suspicious omen, it should have been definitely mentioned. In absence of all explanation, the evidence offered, by a fair and reasonable construction, amounts to a justification of the words on which the plaintiff's suit is founded, and without notice the truth of the charge is not admissible: *Underwood v. Parks*, 2 Str. 1200; *Bailey v. Hyde*, 3 Conn. 466.

5. Relative to the certificate of Parks the evidence was rightly received. Between the testimony of the witness, that the character of Bill was below the common level, and that at a former period the witness had admitted his reputation to be good, there was no inconsistency. If there had been the witness should have claimed his privilege of exemption from the testifying in disparagement of himself, and not the defendants have objected to the admission of his evidence.

6. The offer of the defendants subsequent to the propagation of the slander, to name the author of the words spoken, would not, by retrospect, extinguish or lessen the injury perpetrated; and on no principle could have been received.

The other judges were of the same opinion.

New trial not to be granted.

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In *Williams v. Miner*, 18 Conn. 474, this case is cited, showing that a witness need not be required to give the exact language in an action for slander.

In *Case v. Marks*, 20 Conn. 251, Church, C. J., holds that evidence of general reputation that a party had been guilty of a particular crime was admissible in mitigation of damages and referring to the principal case, he says: "In the case of *Treat v. Browning* evidence had been admitted, on the trial, of general reports that the plaintiff had committed the alleged crime, as proof of character and in mitigation of damages. And this was approved by this court; and the English cases recognizing the same principle were cited in the case with approbation. These cases certainly justify what we believe to have been the general understanding of the legal profession in this state on this subject." This evidence was held admissible in *Cook v. Bartley*, 2 Am. Dec. 343; *Easterwood v. Quinn*, 3 Id. 700. As to evidence in justification, not admissible in mitigation, see *Wolcott v. Hall*, 4 Am. Dec. 173; *Bailey v. Hyde*, 8 Id. 202.

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## DEAN v. MASON.

[4 Conn. 428.]

**NO WARRANTY FROM SOUND PRICE.**—The sale of a chattel for the price of a sound article of that description, will not amount to a warranty that such article is sound and merchantable.

**RIGHT OF ACTION FOR UNSOUNDNESS.**—To entitle a purchaser to maintain an action against the seller for unsoundness in a chattel sold, there must be either fraud or express warranty.

**WHEN EVIDENCE OF FRAUD INADMISSIBLE.**—In an action on a warranty on the sale of a chattel, where there is no substantive allegation of fraud, evidence of fraud is inadmissible.

**ACTION FOR MONEY HAD AND RECEIVED.**—To sustain an action for money had and received for a failure of consideration, there must be a total failure; it is not sufficient that the plaintiff gave a note for such consideration which he never paid.

**ASSUMPSIT.** Plea, *non-assumpsit*. Verdict for the defendant, and motion for a new trial. The facts of the case are stated in the opinion.

*E. Young*, in support of the motion.

*Goddard and Cleaveland*, contra.

HOMER, C. J. The plaintiff has insisted that his action is sustainable on the ground, first, of express warranty; secondly, of implied warranty; and thirdly, of fraud.

1. As to the claim on the ground of express warranty. The written contract exhibited in evidence, contains no clause warranting the soundness or goodness of the articles sold. The vendor agreed to deliver two bales of deer-skins, at the price of thirty cents per pound; and this, so far as relates to the point under consideration, was the whole engagement. The plaintiff offered in evidence certain affirmations, made to induce the purchase of the skins afterwards sold, as proof of the express warranty alleged in his declaration, but this the court rejected, and most correctly. The contract between the parties was entirely in writing, and all the previous representations made by the defendant were merged in the written instrument. Everything before resting in parol became thereby extinguished, upon this reasonable rule, that when an agreement is reduced to writing, all previous negotiations are resolved into the writing, as being the best evidence of the certainty of the agreement: 5 Vin. Ab. 515, 517; *Vanderwoort v. Smith*, 2 Cai. 161; *Mumford v. McPherson*, 1 Johns. 413 [3 Am. Dec. 339]; *Parkhurst v. Van Corland*, 1 Johns. Ch. 282 [7 Am. Dec. 427]; *Stevens v. Cooper*, 1 Id. 429 [7 Am. Dec. 499].

2. The implied warranty contended for is founded on the presumed fact that an adequate price was given for the skins, admitting them to be good, and on the inference that this amounts to a warranty of the articles sold, as being sound and merchantable. Whether the price paid was equivalent to the value of merchantable skins nowhere appears, and the supposed foundation of argument never existed. But if the fact were

apparent, the inference would not be sustainable. The notion that a high or a sound price is tantamount to warranty has long been exploded: 2 Phil. Ev. 79. In *Parkinson v. Lee*, 2 East, 314, it was adjudged that no warranty was implied from the fullness of the consideration, and that if the seller sells the thing as he believes it to be, without fraud, the law will not imply that he sold it on any other terms than those expressed. And it is an established rule, that in order to entitle a vendee to maintain an action against the vendor, there must either be fraud or an express warranty: *Holden v. Dakin*, 4 Johns. 421; *Sands v. Tylor*, 5 Id. 395 [4 Am. Dec. 374]; *Thompson v. Ashton*, 14 Id. 316; *Chapman v. Murch*, 19 Id. 290, *post*; *Sweet v. Colgate*, 20 Id. 196.

The vexatious and expensive litigations which might often arise from the doctrine of warranty implied from the soundness of the price, are prevented by the adoption of a certain rule, which can never operate unjustly, as by the buyer an express warranty may always be demanded. The case of *Gardner v. Gray*, 4 Camp. 144, may be supposed to clash with the principles I have assumed, but in reality it has no bearing on the matter in controversy. A sample of certain waste silk was shown to the plaintiff, which silk he purchased, not having seen it; and afterwards, on being sent to him, it was found to be much inferior to the sample exhibited. The sample was produced, not as a warranty, but to enable the purchaser to form a reasonable judgment of the commodity, and he had a right to expect a salable article, answering the description of the contract. He had no opportunity to inspect the silk, and the maxim of *caveat emptor*, for this reason, did not apply. He might say with perfect truth, *non haec in foedera veni*, this was not the article described and sold. But if it had been shown to the purchaser, and he had then bought it, the case would essentially differ from the former; and had the quality been misconceived, the loss must have fallen on the purchaser, unless there was an express warranty.

8. Testimony in proof of fraud was offered by the plaintiff and rejected, and the propriety of this constitutes the only remaining question. Undoubtedly there are actions of *assumpsit*, founded on a breach of duty, partaking of the nature of a tort; but the plaintiff's suit is not of that description: *Powell v. Leighton*, 2 New Rep. 365; *Hallock v. Powell*, 2 Cai. 216. According to the most approved precedents, it is an action on the contract of warranty, and nothing more. In the part of the



declaration wherein the original foundation of the action is set forth, the defendant's undertaking and promise is specified, but nowhere is there to be found any allusion to fraud, except in the specification of the breach. There it is said that the defendant, "contriving to injure the plaintiff in that behalf, did not regard, keep and perform his promise and undertaking aforesaid, but craftily and subtilely deceived the plaintiff in this," etc. This is the common form of alleging a breach in *assumpsit*, as will be demonstrated by reference to the books of entries. This mode of alleging breaches in mere *assumpsit* will be found in declarations on promissory notes: Pleader's Assistant, 38, 39; on awards, 2 Chit. Plead, 80; on promises, Id. 85, 87-90, 97, and on warranty, Id. 100. When the gist of the action is placed on a false warranty, the plaintiff avers, in setting forth the nature of his claim, that the defendant falsely and fraudulently affirmed: Id. 576.

In *Evertson v. Miles*, 6 Johns. 138, which was an action very analogous to the one before the court, it was said by Van Ness, J.: "When the plaintiff does not go for a breach of contract, but founds his action on deceit and fraud in the sale, the fraud must be averred and charged as a substantive allegation. To admit the proof of it, without such averment, would be going wide of the issue, and taking the party by surprise. To justify the proof offered, it ought to have been charged that "the defendant falsely and fraudulently represented." The court in this case rejected the testimony to show fraud, precisely for the want of those allegations which the judge in the case before us considered as indispensable.

On the count for money had and received, little reliance seems to have been placed; and certainly it merits no consideration. The defendant never received any money from the plaintiff, the note given in consideration of the skins never having been paid.

PETERS, BRAINARD and BRISTOL, JJ., were of the same opinion.

CHAPMAN, J., was of opinion that the articles in this case had a marketable value, and that there was created on that account an implied warranty as to quality.

New trial denied.

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See note to *Bailey v. Nichols*, 1 Am. Dec. 83, where the doctrine of this case is noticed.

## PATTEN v. SMITH.

[4 Conn. 480.]

**MORTGAGOR REMAINING IN POSSESSION.**—Where a mortgagor of chattels remains in possession, and uses such property as his own, it is merely presumptive of fraud, and should be submitted as a question of fact to the jury.

**"TOOLS" EXEMPT.**—Within the meaning of the statute exempting certain property from execution, apparatus for printing as a printing press, cases and types may be considered as "tools" if they are necessary for the upholding of life, and whether they are so or not, is a question of fact.

**TRESPASS** for carrying away a printing apparatus consisting of a press, cases, types, etc. It appeared that one Marsh, a book-binder, carried on the business of book-binding in a shop belonging to Patten; that Patten sold the property in question to Marsh on credit, who two months thereafter executed a mortgage of the same to Patten to secure the purchase-money within ten months thereafter. During all this time Marsh retained possession of the property, using it as his own and carried on the business of printing therewith. More than a year after the expiration of the time stipulated in the mortgage for payment, the property was levied upon by the defendant Smith, at the suit of a *bona fide* creditor of Marsh, also defendant, and sold. The judge directed the jury to find for the defendants, which they did. Motion for a new trial on the ground of misdirection.

*N. Smith and Tousey*, for the plaintiff.

*Daggett and T. S. Williams*, contra.

**HOSMER, C. J.** The case presents three questions for the determination of the court. 1. Was the judge authorized to direct the jury, that they should render their verdict for the defendants? 2. Were the goods and chattels taken by the defendants, tools of Marsh's trade and legally exempted from execution? 3. Was the conveyance by mortgage to the plaintiff fraudulent in respect of creditors?

1. In the charge to the jury the judge assumed the decision of a question of fact; and for this reason it was incorrect. If, however, on considering the motion in this case, it clearly shall appear that no injustice has been done, I would not for the impropriety of the charge, advise a new trial.

2. All the personal estate of a debtor may be attached or

levied on by execution, except "necessary apparel, bedding, tools, arms or implements of his household, necessary for upholding his life; and upon such goods also, if they shall be presented by the debtor:" Stat. 280, 1 ed. 1808. Printing, unquestionably, is a mechanical employment. It, however, has been said that a printing press, cases and types, are not tools within the meaning of the statute; and to establish this position, the case of *Buckingham v. Billings*, 13 Mass. 82, was cited. The act of the state of Massachusetts on this subject, is not identical with ours, and in one particular at least, which furnishes no unimportant ground of construction, is entirely different. Household-furniture beyond the value of fifty dollars, is not exempted from execution, and on this provision considerable stress was laid by the court in the before-cited case, when ascertaining the intention of the legislature. I do not know that I should dissent from the opinion expressed in *Buckingham v. Billings*, that the types, etc., levied upon, were not necessities, as articles of the same kind were left unattached to the value of more than sixteen hundred dollars; but to some of the principles assumed, with great deference for the learned court, I cannot subscribe.

As a general legal truth, a statute in derogation of the common rights of creditors ought to receive a strict construction; but if it concern the public good, it should be construed liberally: *Alexander Poulter's case*, 11 Co. 17; *The King v. Archbishop of Armagh*, 1 Str. 517. Now the public has a deep interest in the prosperity of mechanical employments and a sufficient corrective is interposed by the prescribed inquiry, whether the articles claimed to be exempted are necessary. In relation to the natural description of the goods of which an exemption is demanded, the exposition of the law, in my judgment, ought to be liberal; but so far as respects their protection, in a given case, on the ground that they are necessary for the upholding of life, this is a strict inquiry of fact.

It has been insisted in conformity with the above-mentioned case, that by the word tools is indicated such implements only as are used by the hand of one man; but this confined construction of the term, I cannot admit. In its origin the word in question was applied to such instruments only as were of manual operation; but the usage of speech has long since extended it beyond these bounds. On the principle assumed by the supreme court of Massachusetts, the blacksmith might be deprived of his anvil, the weaver of his loom, and the turner of

his wheel, to the entire destruction of their respective occupations. It was the object of the statute to protect the tools of a trade, so far as they were indispensably necessary; and the words of this, as of other laws, ought to be expounded according to their popular acceptance in order to attain the legislative intent. In manufactories of recent origin, there may be complicated machinery and expensive utensils of great value, which do not fall within the principle of exemption, and to this subject I refer without the intimation of an opinion, cautiously to guard against inferences beyond the principles I have assumed.

That the printing press, cases, and types, taken by the defendants, were the tools of Marsh's trade, within the intendment of the statute, I entertain no doubt. The two last-mentioned articles are such in the strictest sense of the word; the former is indispensable to attain the object of the legislature in allowing the exemption contemplated, and they are all embraced within the popular meaning of the preceding term. In order to their exemption, the tools of a person's trade must be necessary for the upholding of life. Whether the goods taken by the defendants are embraced within this description, is exclusively an inquiry of fact which should have been submitted to the jury. The pursuit of two trades by Marsh, did not deprive him of the legal exemption of his tools in either trade if they were necessary and the latter occupation was requisite for the procurement of subsistence. It is clear beyond dispute, that a tradesman may waive a privilege imparted to him by law; but in this case there was no intentional waiver, nor anything which the law pronounces to be of that character. Marsh had an equity of redemption in the goods taken and remained the owner of them, in legal contemplation, subject to the right of Patton to render them available for the payment of his debt. They remained in the possession and use of Marsh, as before their hypothecation; and by this act they were not laid open to the attachment of his creditors.

3. Was the conveyance by mortgage, the goods having been left in the possession of the mortgagors, fraudulent in respect of creditors? If the above-mentioned goods were not exempted from the attachments and executions of creditors, it is manifestly clear that a strong badge of fraud exists, and even conclusive evidence of it, unless explained by the most satisfactory reasons: *Burrows v. Stoddard*, 3 Conn. 160, 431. But if the goods were shielded from the demands of creditors by a legal exemption, how could the conveyance to Patton be made with

an intention to defraud them? Marsh could have had no possible motives to put this property under cover, as it was already invincibly protected from every demand. The presumption of fraud is necessarily repelled, if the exemption insisted on actually exist.

The other judges were of the same opinion.

New trial to be granted.

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## MITCHELL v. HAZEN.

[4 Conn. 495.]

**BREACH OF COVENANT OF SEISIN.**—An administrator under an order of sale gave a deed, and covenanted that at the time he was well seised in fee-simple, and had a good right to sell. The premises were parcel of a farm owned and held in common by the heirs of the intestate, and others, in unequal proportions, and the deed purported to convey by metes and bounds, a part of the estate held in common. It was held that no title passed, the grantor being capable of conveying only an undivided part of the whole; and, therefore, the covenants were broken immediately on the execution of the deed. To constitute a breach of a covenant of seisin, an eviction is not necessary.

**CONVEYANCE BY ADMINISTRATOR.**—A general power of sale, given by the court to an administrator, authorizes him to execute such an instrument as will legally convey the estate sold.

**PERSONAL LIABILITY.**—Whenever a person undertakes to stipulate for another by an instrument under seal, without authority, or beyond it, he is liable personally on the contract, and this, notwithstanding he describes himself in his representative character.

**ACTION** for the breach of the covenants of seisin and good right to convey in a deed executed by the defendant Hazen, the administrator of David Mitchell. The deed purported to convey by metes and bounds a certain portion of a tract of land held in common in unequal, undivided shares by Simeon Mitchell, the heirs of Samuel Mitchell, and the heirs of David Mitchell. The case further appears from the opinion. Verdict for the plaintiff, and motion for new trial.

*Benedict and D. S. Boardman*, in support of the motion.

*Bacon and J. W. Huntington*, contra.

**HOMER, C. J.** In this case there are four questions presented for determination: 1. Whether the defendant's covenant was broken; 2. Whether the defendant bound himself by his covenants personally; 3. Whether the deeds and distributions rejected by the court below, were admissible; and 4. Whether the rule of damages was correctly stated.

1. Was the defendant's covenant broken? Covenants are to be construed so as to have effect and correspond with the intention of the parties, at the time of making them. In their creation, technical words are not necessary, nor indeed are any expressions in particular; for anything under the hand and seal of the parties importing an agreement, and amounting to a covenant, will support an action: 1 Roll. 518; Shep. Touch. 158; *Williamson v. Codrington*, 1 Ves. 516; 3 Cruise's Dig. 65. In the case under discussion, the defendant covenanted with the plaintiff that, "at and until the ensealing of these presents, he was well seised of the premises as a good indefeasible estate, in fee-simple and had good right to bargain and sell the same, in manner and form as above written." The defendant in fact had no title to the land in question; but was empowered by the court of probate, to sell the estate of David Mitchell, deceased, in payment of debts. He likewise was in possession of the premises at the time he executed to the plaintiff the deed declared on. There is no pretense for the assertion that he was seised of the premises as of an estate in fee-simple, or had any part of this seisin but an actual possession. On this, however, I do not lay any stress, as from the whole deed it is apparent, that the defendant was acting only as administrator under a power to sell, and this was well known to the plaintiff. The defendant, nevertheless covenanted that he had good right to sell the premises in fee-simple in manner and form as he was doing by his deed. Cruise, in his Digest, vol. 4, p. 78, when treating on the construction of the covenant of seisin and good right to sell, remarks that if the vendor is seised in fee they are of similar import. But he says the converse of this proposition does not hold, for a person not actually seised in fee may have power to convey. Thus where a tenant in tail conveys to a person to make him a tenant to the *præcipe* in order that a common recovery may be suffered to the use of the purchaser in fee, or where a person conveys under a power, the covenant is that the grantor hath good right to convey. This covenant most obviously does not relate to the deed or instrument of conveyance, but to the estate intended to be granted: *Parker v. Parmalee*, 20 Johns. 130. When the grantor is tenant in fee-simple, it is equivalent to the covenant of seisin, but when he confessedly has no title to the thing granted, it is a covenant that he has power to sell and convey precisely such an estate as the deed specifies.

The question then naturally arises, has there been a breach

of the defendant's covenant? This land described in the defendant's deed and purporting to be conveyed was parcel of a farm of land, owned and held in common and undivided by Simeon Mitchell, and the heirs at law of Samuel Mitchell, deceased, and the heirs at law of David Mitchell, deceased, in unequal proportions. The deed of the defendant by the terms of it, purported to convey by metes and bounds an undivided interest in and to a part only of the estate, held as aforesaid in common and not an undivided property in the whole of it. Is it true then that the defendant had good right to sell and convey the premises in manner and form? It is not pretended that the court of probate gave the defendant any power except one of a general nature to sell the estate of the deceased; and it is clear that no authority was derived from the law to make the preceding disposition of the property. On the principles of law firmly established the defendant was empowered only to convey an undivided proportion of the estate, throughout the whole farm held in common, and either the whole or a part of the interest which the said David, deceased, had in the premises. In performing this act, the defendant was not authorized to impair, vary, or in any respect prejudice, the estate of the other tenants in common.

In *Tboker's case*, 2 Co. 67, it is said, when speaking of joint tenants, that "if one attorns only he may prejudice his companion;" "and for this reason one joint tenant only shall not be suffered to attorn of record, for the manifest prejudice which would accrue to his companion if it should be the attornment of both." To the same effect is the remark of Popham, J., in *Rud v. Tucker*, Cro. Eliz. 803, that it is clear every act by one joint tenant for the benefit of his companions shall bind; but those acts which prejudice his companion in estate shall not bind."

Indeed the proposition is self evident, that one tenant in common cannot deprive his co-tenant of any part of his interest in the common estate, nor in any respect lessen or vary his legal rights. But if he is permitted to divide the common property into distinct moieties by metes and bounds, and then dispose of a certain proportion in the property thus separated, he prejudices his co-tenant. On a writ of partition the moiety thus divided and disposed of undoubtedly may be aparted to the other tenant, and his right to claim such partition cannot be impaired without his consent. Nor can this objection be obviated by admitting that this right cannot be lessened, but

that the purchaser may go beyond the limits of his purchase and have his portion assigned in that part of the property which is beyond the bounds of his deed. In this portion of the property his deed gives him no right or estate, nor can he have any communicated by a partition which is no conveyance, but a distribution founded on antecedent right. It is clear, if David were living, that he could not convey a part of the common estate in the manner in which the defendant has attempted to do; and has his administrator any right which was not vested in his intestate? Certainly not. It is thus unquestionable that the defendant had no authority to convey the premises to the plaintiff by metes and bounds, and that his covenant, for this reason, is broken.

The nature of the covenant demonstrates that the breach of it was instantaneous on the execution of the deed. The principle is correctly expressed by Parsons, C. J., *Marston v. Hobbs*, 2 Mass. 437 [3 Am. Dec. 61]. The action was upon a deed containing covenants of seisin, of freedom from incumbrances, of a good right to sell and of warranty. "The manner of assigning breaches of these covenants (says Parsons, C. J.) deserves some attention. The general rule is that the party may assign breaches generally, by negating the words of the covenant. The exception to the rule is, that when such general assignment does not necessarily amount to a breach, the breach must be specially assigned. The first and third covenants in this case, that is the covenants of seisin and of good right to sell, come within the rule. If the defendant was not seized, or if he had no right to convey, these covenants must necessarily be broken. They are called synonymous, because the same fact, the seisin of the defendant, which will support the first, will also support the other covenants." He then justly remarks that "when the breaches assigned to the first and third covenants are found for the plaintiff, it then appears that those covenants were broken as soon as the deed was executed, and that no estate or interest passed by the conveyance." The cases cited by the counsel for the plaintiff prove incontrovertibly that the covenant of seisin was instantaneously broken, so soon as it was made, if the covenantors were not seized, and that there was no necessity for an eviction; because the covenant was not suspended at all on the happening of this fact; and it is past all controversy that the breach of the analogous covenant of good right to convey, falls precisely within the same reason and principle: *Bickford v. Page*, 2 Mass 455.



The defendant's covenant was not merely false in part, but altogether so, and the breach therefore is total. The deed passed no title; and in effect was an utter nullity. The cases of *Starr v. Leavitt*, 2 Conn. 243 [7 Am. Dec. 246], and *Hinman v. Leavenworth*, 2 Id. 244, n., on this subject, are perfectly conclusive, because they are entirely analogous with, and not capable of any essential discrimination from the one before us. Between the levy of executions on a part of an estate held by two tenants in common, for the debt of one of them and a deed executed in the same manner, what is the difference? They are both conveyances of real estate, one by virtue of the statute regulating the levy of executions, and the other by the act of the party; and their invalidity, for the same reason, results from the legal impossibility of performing an act which is injurious to a third person. It cannot be true, that you may not prejudice a person by the levy of an execution for the debt of his co-tenant, so as to impair or vary his rights in the common estate, but that the conveyance of one of the tenants in common, in the same manner, and effecting the same injury, is legally binding. This would be a pointed inconsistency, and sanction the perpetration of a prohibited injury, if it is done in a certain mode. The question has correctly been stated by the supreme judicial court of the state of Massachusetts, in *Bartlet v. Harlow*, 12 Mass. 348 [7 Am. Dec. 76].

A covenant against incumbrances, stands on a ground altogether different from the covenant of seisin, or of good right to convey. On an incumbrance not extinguished the grantee can only recover nominal damages, but if it has been extinguished the sum recoverable is the full amount of the payment, which the party has been compelled to make. The above rule is founded on this reason, that such covenant is considered as strictly a covenant of indemnity, and that the grantee ought not to recover the value of the incumbrance on a contingency, when he may never be disturbed by it. This is a reasonable rule, for if he were to recover the value, for example, of an outstanding mortgage, the mortgagee might still resort to the defendant, on his personal obligation, and compel him to pay it, and if the purchaser feels the inconvenience of the existing incumbrance and the hazard of waiting till he is evicted, he may go and satisfy the mortgage, and then resort to his covenant: *Prescott v. True-man*, 4 Mass. 627 [3 Am. Dec. 246]; *Pitcher v. Livingston*, 4 Johns. 1 [4 Am. Dec. 229]; *Delavergne v. Norris*, 7 Id. 358 [5 Am. Dec. 281]; *Deforest v. Leete*, 16 Id. 122.

It was contended by the defendant, that he was estopped from claiming title by the covenants in his deed, and that this had an important bearing on the point now under discussion. Let the estoppel be admitted, and give to it the legal effect of precluding the claim of the defendant, and the difficulty of the plaintiff will remain in undiminished force. What was the defendant's claim? Absolutely nothing, except a power to sell, which, if not legally executed, may be performed in future by another administrator. Besides the conveyance is a nullity imparting to the purchaser no right, and from the estoppel of the administrator no possible benefit can be derived.

It is proper that some attention should be paid to the claim of the defendant, that being in possession under color of title, with a power to sell by an order from the court of probate, the covenants of seisin of right to convey are not broken. To sustain the proposition he has cited the case of *Twombly v. Henley*, 4 Mass. 441, and *Prescott v. Trueman*, 4 Id. 627 [3 Am. Dec. 246, which contain this principle; that a covenant of seisin is not broken if the grantor, at the date of his deed, was seised in fact, either by wrong or by a defeasible title. This principle does not apply, as the defendant was not possessed under claim of right in the land now in question, but only of a power to sell, and the supposed analogy entirely fails. Besides the covenant on which the plaintiff's suit is sustainable, is that of a good right to sell. Now it cannot be said, even with plausibility, that the defendant's having had a naked possession, would confer on him a right of disposition in the manner attempted, and nothing short of this will show that his covenant remains unbroken. I do not, however, admit that an actual seisin or possession, for these words are synonymous in their application here, will validate the covenant; that the grantor is seised of an estate in fee-simple if the legal freehold and fee were in another person. It is the true construction of the covenant, that the grantor is legally seised, and if he is not, but has merely a naked possession, the contract is not kept because it is untrue.

I am clear, therefore, that the defendant's covenant was broken.

2. Did the defendant bind himself by his covenants personally? This is the next question. The deed executed by him was signed "Elijah Hazen, administrator," and his covenants were in the following words: "I, the said Elijah, do for myself, my heirs, executors, and administrators, covenant with the said Timothy, his heirs and assigns, that at and until the

enscaling of these presents, I am well seised of the premises, as a good, indefeasible estate in fee-simple; and have good right to bargain and sell the same, in manner and form as above written; and that the same is free from all incumbrances whatsoever, except as above." These covenants must be construed with effect, *ut res magis valeat quam pereat*, and correspond with the intention of the parties at the time of making them; and if there remains any doubt in respect of their meaning, they are to be taken in that sense which is the most strong against the covenantor and beneficial to the other party: *Hookes v. Swain*, 1 Lev. 102; S. C., 1 Sid. 151; *Amner v. Luddington*, And. 60; 1 Bulstr. 175; Hob. 304; Co. Lit. 134; Plowd. 156.

It is indisputably clear that the power of sale given by the court of probate to the defendant, without prescribing the manner in which it was to be executed, authorized him to make such an instrument only as was legally proper for the conveyance of the deceased's estate: *Longford v. Eyre*, 1 P. Wms. 741; 4 Cruise's Dig. 254. The defendant was not required by his duty and trust to enter into any personal covenant for the security of the title to the property conveyed, nor for the validity of the conveyance, and it has not been contended that for this purpose he had authority to bind the heir of the deceased, or to subject the assets. It is unquestionable, that unless he bound himself personally, his formal and solemn covenants under seal were a nonentity, and *vox et preterea nihil*. Although he was under no obligation to enter into covenants, he was at liberty to do it, if he chose to excite in this manner the confidence of purchasers, or to enlarge the proceeds of the sale, upon the general principle that a covenant to do anything that for the substance and matter of it is lawful, is good: Sheppard's Touchstone, 159. If the covenants of the defendant are to be construed as having any effect, they must be considered as binding on him personally; for they can be obligatory on no other person. So if the words of his covenant are at all indicative of his meaning, he, and he only, intended to be holden to the performance of them.

It is worthy of remark that he has covenanted, not only for himself, but for his heirs, executors and administrators, which places his intention in an irrefragible light. With respect, then, to the intentions of the covenantor, or the effect of his covenants, there can exist no serious question, unless the mind will admit the palpable absurdity that he meant nothing. There being subjoined to this signature the word "administrator,"

and the subject-matter of his conveyance being the estate of other persons, cannot invalidate the construction given to his act. The former was unnecessarily, I admit, a *descriptio personæ* only, and the latter is not prohibitory of any lawful agreement he should please to make. It has long been an established principle, that whenever a man undertakes to stipulate for another by an instrument under seal, without authority, or beyond authority, he is answerable personally for the non-performance of his contracts; and if he choose to bind himself by a personal covenant, he is legally liable for a breach of it, even although he describe himself as covenanting as trustee, agent, executor or administrator: *Appleton v. Binks*, 5 East, 148; *Thacher v. Dinsmore*, 5 Mass. 299 [4 Am. Dec. 61]; *Sumner v. Williams*, 8 Id. 162 [5 Am. Dec. 83]; *Duvall v. Craig*, 2 Wheat. 45; *White v. Cuyler*, 6 T. R. 176; *Wilkes v. Back*, 2 East, 142; *Tippets v. Walker*, 4 Mass. 595; *Thayer v. Wendall*, 1 Gall. 87.

The determinations in *Sumner v. Williams* and *Duvall v. Craig* go the full length of the present case, and are applicable to it on a principle of strict analogy. The case of *Coe v. Talcott*, 5 Day, 88, is a strong authority in support of the opinion expressed, and contains this important principle: that "a trustee acting within his powers, does not render himself liable on his contracts and conveyances; but wherever he exceeds his powers and undertakes to transfer and convey without authority, he becomes personally answerable to the grantee on his covenants." This is precisely the case before the court. The defendant exceeded the powers with which he was invested, and undertook to transfer and convey, in a manner which he had no right to do, and therefore without authority. It results, then, that he is personally liable, on the principle of the case last cited, as well as on the other legal grounds before discussed.

3. Whether the deeds and distributions rejected by the court below were admissible, is the next subject for consideration. On this question I shall be brief, as little is required to be said. The distribution of Samuel's estate was totally irrelevant, as in its effect it only proved that the land in question was owned by one tenant in common less than the plaintiff had supposed, but left a tenancy in common of the farm before mentioned between Simeon and the heirs of David. If the common estate remained throughout the above property, the sale by the defendant was equally illegal, as if the number of tenants in common had been ever so great, and of consequence, his covenant, for the same reason was equally broken. The second distribution was of

David's estate; before the making of which, and while the tenancy in common unquestionably existed, the defendant executed the deed, and bound himself in the covenant on which the plaintiff's suit is founded. It was likewise made by metes and bounds, and therefore was void upon the same principles as the deed executed to the plaintiff was invalid. The sale made by the defendant to the plaintiff was never returned to the court of probate, and by necessary consequence, could not be appealed from; and the subsequent acceptance of the distribution cannot be considered as having affirmed a sale, which does not appear ever to have been judicially known. Finally, the right of Simeon as tenant in common, and seised *per my* and *per tout*, can never be varied or diminished by the distribution of David's estate. Simeon, in respect of property not derived from his brother David, was a stranger to the proceedings of the court of probate, over whom and whose estate that court had no jurisdiction; and his right now to compel partition, and to obtain, if it should be thought just and expedient, an appropriation of the whole land, of which the defendant attempted to convey to the plaintiff a part, is precisely the same as if David were living, or there had been no distribution or sale of his estate. This transient glance at the subject is sufficient to show that the rejection of the evidence by the court below was entirely conformable to law.

4. Whether the rule of damages was correctly stated is the only remaining question. In this state, the rule of damages for breach of the covenant of seisin ever has been the consideration of the deed with the interest: *Horsford v. Wright*, Kirby, 3 [1 Am. Dec. 8]; *Castle v. Pierce*, 2 Root, 294. The same rule has been sanctioned in the contiguous states, and it is impossible, upon any just principle, to adopt a different standard. The intended conveyance is a nullity; and the contract, as to any operation, is precisely as if it had never been, or as if it had been rescinded. Unless vindictive damages were allowed, for which there exists no sufficient reason, what can be more consonant to natural justice than that the grantee, who has got nothing for his money, should have it returned to him?

The covenant that the grantor has good right to sell, in many cases is synonymous with the covenant of seisin; and when it is not, so far as respects damages for the breach of it, it stands precisely on the same ground. If the grantor had not good right to sell, the covenant is broken instantaneously, so soon as it is made, as the covenant of seisin is, when the covenantor is

not seised, and the reason for returning the consideration, where the conveyance has wholly failed, in both cases is precisely equal. I am aware that in *Prescott v. Trueman*, 4 Mass. 627 [3 Am. Dec. 246], it is laid down as a rule that nominal damages only will be given for the breach of the covenant that the grantor had right to convey until the estate conveyed has been defeated, or the right to defect it has been extinguished.

This opinion is *obiter*, unsustained by any case or established principle, and in opposition to the rule of the same court in respect of the covenant of seisin. I have the highest deference for the source from which the above opinion emanated; but I cannot admit it to be just or supported by analogous cases.

It is said that as the plaintiff was in possession of the land in question, and answerable for the rents and profits, they should have been deducted from the damages. To this proposition I cannot assent. The money due for the rents and profits has no relation to the covenant broken, but constitutes a separate and distinct debt. It could not be set off, had the claim been duly made, as it is a demand in which the defendant had not a sole interest, if he has any, which I very much doubt. The rents and profits are legally due to Simeon and the heirs of David, and in all events, Simeon is a joint creditor in relation to this demand.

It has been contended that the consideration-money for the land in question was applied to the payment of debts against David's estate; and that the plaintiff, being one of his heirs, has received a benefit from this source which ought to diminish his damages. No such fact appears to have been proved; and if it had, it constituted no indebtedness on the part of the plaintiff, but gave to the defendant a right to remunerate himself out of the assets of his intestate. Besides, it had no relation to the point of damages in this case, and therefore could not be allowed to diminish them.

In conclusion, I am of the opinion that the determination of the judge below has done no injustice to the plaintiff, and should not advise a new trial.

The other judges were of the same opinion.

New trial not to be granted.

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In *Hartford etc. Co. v. Miller*, 41 Conn. 129, the authority of this case is followed, showing that a deed by a tenant in common of a portion of the common estate by metes and bounds is inoperative as against his co-tenants.

In *Hubbard v. Norton*, 10 Conn. 433, it is cited, showing that a covenant that the grantor is owner is a personal covenant.

## BRACKETT v. NORTON.

[4 CONN. 517.]

**LEX LOCI APPLIED.**—A claim under a contract for services made in another state, must be determined by the laws of that State.

**EVIDENCE OF FOREIGN LAWS.**—Foreign laws cannot be noticed judicially, but must be proved as facts; and in this respect the laws of the respective states of the Union are considered foreign.

**ATTORNEY'S POWER—EXTENT OF.**—The general powers of an attorney do not terminate with the issuance of the execution on the final judgment; he may direct the levy, receive the amount of the judgment, and give satisfaction.

**FRAUD BARRING CLAIM FOR SERVICES.**—An attorney after having obtained final judgment, who tries fraudulently to prevent the collection of the execution, violates his duty, so as to deprive him of his claim for services in procuring such judgment and execution.

**ISSUE.**—If an attorney, having fraudulently defeated the collection of an execution which he had obtained, and having omitted to give any information of this fact to the creditor, be requested to bring a suit against the sheriff for the recovery of the debt, which, by reason of the culpable act of such attorney, is defeated, he can recover nothing for his services in such suit.

**ACTION** by an attorney at law of the state of New York to recover for services rendered by him in that capacity in that state to the defendant. The services claimed to have been rendered were, the prosecution to judgment of an action on a note in favor of defendant, and also the prosecution of a suit against a sheriff for the default of his deputy, in not having duly levied the execution obtained upon the judgment on the note. It was admitted that the execution had never been collected and that the maker of the note had become insolvent. The defendant offered evidence to prove that it was owing to the negligence and fraud on the part of the plaintiff, that the judgment had never been satisfied, and prayed the direction of the court that plaintiff could not recover herein.

CHAPMAN, J., before whom the cause was tried, charged the jury that the respective rights and duties of the parties were to be governed by the laws of New York, and proceeded: "By the laws of that state an attorney after he has prosecuted a suit to final judgment and execution, and has delivered the execution to the proper officer, to levy and collect according to law, has done all that he was bound, as an attorney, to do for his client, in respect to the collection of it; except only he is bound to receive the money of the officer when collected, and give a receipt for the same. He is not bound, nor has he any right,

to interfere with the officer in the collection of the execution; and should he do so, and thereby injure the creditor, he would not be liable to him in an action against him for misconduct as an attorney." The judge further instructed the jury: "As to the claim, which the plaintiff had for his fees, in the suit on the note, you have a right, by the laws of the state of New York, to set off any damages the defendant may have sustained by the fraud, negligence or misconduct of the plaintiff in the management of said suit, or in the exercise of his powers as an attorney therein; and the rule of law is the same in respect to his fees charged in the suit against the sheriff; but damages sustained by the defendant, by the misconduct of the plaintiff, in the management of one cause, cannot be set off to diminish the claim which the plaintiff has for his fees in the other cause, provided the retainers in such suits were had at different times, and were separate. An authority to collect a note merely does not include in it a power to prosecute the officer for misconduct in collecting the execution which may have issued thereon; and under these directions you will find your verdict."

Verdict for the plaintiff and motion for a new trial for misdirection.

*Bacon and T. Smith*, in support of the motion.

*P. Miner and J. W. Huntington*, *contra*.

HOSMER, C. J. The general question in the case is whether the law implies a contract, that the defendant shall pay the plaintiff for the services performed by him; and the motion for a new trial if founded on the supposed incorrectness of the charge given to the jury.

The services of the defendant having been rendered in the state of New York, under a contract made in that state, their laws are the standard by which the case must be determined. Although the charge of the judge contains a construction of these laws and a direction to the jury in what light they are to be regarded, yet from the imperfection of the motion I am unable to discover whether they were in evidence before the court and jury, or whether the judge expressed a judicial opinion upon them, no testimony in this particular having been exhibited. That the court could *ex officio* take notice of and give a construction to the above-mentioned laws after the uniformity of doctrine and decision on this subject will not be pretended. All the determinations concur in this as an established principle, "that the way of knowing foreign laws, is by admitting them



to be proved as facts, and the court must assist the jury in ascertaining what the law is:" *Mostyn v. Fabrigas*, Cowp. 174; *Freemoult v. Dedire*, 1 P. Wms. 420; *Male v. Roberts*, 3 Esp. 163; *Tilbot v. Seeman*, 1 Cranch, 38; 1 Chit. Pl. 219; 1 Phil. Ev. 301, 302, n.

In the United States this doctrine has often been recognized: *Smith v. Blagge*, 1 Johns. Cas. 238; *Legg v. Legg*, 8 Mass. 99; and that the respective states in relation to each other, being within the reason of the rule are in this particular to be considered as foreign nations. In *Hebron v. Marlborough*, 2 Conn. 18, this court adopted the same principle in respect of the laws of Massachusetts. That the laws of New York, in relation to the duties of an attorney, under a general retainer are peculiar and different from our own, or at least were supposed to be, may conclusively be inferred from the whole frame and purport of the charge to the jury. Hence to these laws they were referred as the guide of their decision, and the instruction given them regardless of the common law as understood in Westminster Hall, or in this sister state, was entirely restricted to the laws of New York. If these laws were not in evidence the court assumed a judicial knowledge of them, and for this reason the charge below was erroneous. But if in relation to them proof was exhibited to the jury, although the judge might express an opinion on the evidence he was not authorized to give a direction, and in thus doing he usurped the jurisdiction of those who have an exclusive right to determine every question of fact: *New York Firemen Ins. Co. v. Walden*, 12 Johns. 513 [7 Am. Dec. 340]; *Smith v. Carrington*, 4 Cranch, 62.

In his charge to the jury, the judge, after having clearly and definitely informed them what was the law of New York on the subject under their consideration, said to them, "under these directions you will find your verdict." From the whole tenor of the charge as well as from the concluding observations just recited, the fact on trial was taken from the jury and definitely settled by the court. In this respect the proceeding below was erroneous, and if it resulted in an ultimate determination of the cause I might here, with propriety, pause. But as there must be a rehearing, and the law of New York may be found, what I have no reason to doubt it will, not peculiar but like our own, founded on the common law as generally understood, I will pursue the subject a little further.

On the principles of the common law, as generally understood, and as recognized in the state of New York, so far as

the reports of their determinations give evidence, I entertain no doubt that the plaintiff, at the time of his supposed fraudulent interference in defeat of the execution, was attorney to the defendant. The cases of *Crary v. Turner*, 6 Johns. 51; *Jackson v. Bartlett*, 8 Id. 361; and *Kellogg v. Gilbert*, 10 Id. 220 [6 Am. Dec. 335], on which much reliance has been placed, only prove that an attorney, from his general powers, cannot, without payment of the debt, discharge a debtor from custody under execution, or acknowledge satisfaction of the demand. In all the above cited cases, the point determined was not when the attorney's powers terminated, but admitting their continuance, that they did not confer authority for the performance of an act which from its nature was fraudulent; and such is the unquestionable law of Westminster Hall: *Cage's case*, Styles, 129. An opinion was expressed that the authority of an attorney determined with the judgment, or at least with the issuing of execution, and in support of this position, reference was had to the common law, as stated in 2 Inst. 378; 2 Bos. & P. 357; and 2 Show. 138.

In the case cited from Bos. & P., Heath, J., observed that by several cases collected in Roll. Ab., it appeared that the authority of an attorney determines with the judgment. In 2 Institute, it is said, not in accordance with the preceding remark, that an attorney in the suit may sue out execution within the year, without a new warrant; and in *Morton's case*, 2 Show. 138, 139, it was decided that the payment of the debt and costs to the sheriff, on executing a *ca. sa.*, does not discharge the judgment; but "otherwise if the money had been paid to the plaintiff's attorney, upon record, for that would have been a payment to the plaintiff himself." That an attorney on an original suit may sue out a *scire facias* against bail, or pray out an *alias*, was adjudged in *Burr v. Atwood*, 1 Salk. 89; and in Roll. Rep. 366, it is laid down, that after judgment he may acknowledge satisfaction on record, upon receiving the money. The assertion, then, that the power of an attorney terminates on the judgment being rendered, is not sustainable, and that it remains until the execution is collected is indisputably true, or he could not do the act of an attorney by the reception of the money in that capacity.

It becomes, however, an important inquiry to ascertain, although the general powers of an attorney remain, how far they extend. An answer to this question is furnished by several determinations of the supreme court of the state of New

York. In *Doty v. Turner*, 8 Johns. 20, the plaintiff's attorney delivered an execution to the sheriff, and directed him to levy it on the property of the defendant, but said that he supposed the plaintiff did not wish to distress the defendant, and that if the property remained in his possession after the levy, the plaintiff would not hold the sheriff responsible if it was squandered, and that he need not take a receipt for it. In this case it was adjudged to be competent for the plaintiff to prove the preceding directions given by his attorney, after the suing out of the execution. Confessions of a general deputy of the sheriff made to the plaintiff's attorney, in answer to inquiries relative to the execution delivered to such deputy, while the execution was in force, were, in *Mott v. Kip*, 10 Johns. 478, held admissible evidence to charge the sheriff. And in *Kellogg v. Griffin*, 17 Id. 274, the instructions given by the plaintiff's attorney to the sheriff, to whom he delivered an execution, were received in evidence, and principally on this basis the case was determined.

The supreme court of Massachusetts, in *Dearborn v. Dearborn*, 15 Mass. 316, decided that an attorney who undertakes the collection of a debt, and commences a suit, upon which the debtor is held to bail, will be liable to an action by his client for negligence should he neglect seasonably to sue a *sci. fa. si non est inventus* be returned on the execution. The plaintiff had caused a demand to be lodged with the defendant, then an attorney regularly practicing in the courts of common pleas and supreme judicial court, upon which he procured a writ to be issued, and thereupon the defendant's body was arrested, and bail taken. Finally judgment was duly obtained, an execution granted, and the same returned *non est inventus*; but against the bail no *scire facias* was sued out and served. The defendant, who was the attorney alluded to, contended in his defense that a *scire facias* was a new suit in which he was not engaged, "not having undertaken to prosecute it, nor having received any directions therefor from the plaintiff." The chief justice charged the jury that an attorney having undertaken to collect a debt, if bail was taken, was bound to prosecute a *scire facias* to final judgment, unless he notified his client of the state of the demand, so that he might have an opportunity to decide for himself whether it should be presented or not. The court sanctioned the determination of the judge *at nisi prius*, and expressed the opinion that "when an attorney undertakes to collect a debt, he is bound to sue out all process necessary to the object;"

that "a *scire facias* is not a new suit;" and that "it is a regular step in the collection of the original demand, and the attorney cannot excuse himself for neglecting seasonably to sue it, unless he give notice to his client and request specific instructions, where he entertains doubts of its expediency."

The cases which I have cited demonstrate that the general powers of an attorney do not terminate when he has prosecuted the suit to a final judgment and execution, and delivered it for collection to a proper officer, but on the other hand, that he may give directions concerning the levy of the execution, and when the fruits of it are obtained, receive the money and acknowledge satisfaction. And the case of *Dearborn v. Dearborn* clearly involves the principle that an attorney having received a debt to collect, has bound himself by contract to take all regular steps requisite to insure its collection, and if he is dubious as to the result of any legal measure contemplated, to inform his client and receive his instructions.

An implied contract is that which reason and justice dictate, and which therefore the law presumes a person has contracted to perform; and upon this presumption makes him liable to such persons, as suffer by his non-performance: 3 Bl. Com. 158. Upon this principle the court may, and often does, presume the extent of an agency from the nature of the case; and hence a contract either necessary or highly expedient in the attainment of a given object, is reasonably to be inferred. When a note is sent for collection from a creditor in one state to an attorney in another, by the reception of it to collect, the latter assumes the duty of performing the measures requisite for this purpose, with integrity, diligence and skill.

Having obtained judgment and delivered the execution to a legal officer, he has not performed all his duty as an attorney to the creditor; and all the cases which show that he may receive the money collected, and acknowledge satisfaction on the record, establish this proposition. That he may give directions to the sheriff relative to his management of the execution I entertain no doubt; and that it is his duty to do it is equally clear, when in his opinion, it will accomplish the object of his appointment. If, for example, he knew of property belonging to the debtor, which was unknown to the officer, he is bound to give him information or he will not act with common integrity; and if he co-operate with the debtor in the concealment of his estate, and thus frustrate the collection of the execution, he palpably violates the duty he has assumed. All these are prin-

ciples founded in reason, and the opposite of them I can never admit; "for I have so great a veneration for the law, as to suppose that nothing can be law which is not founded in common sense or common honesty:" Per Ashurst, J., 2 T. R. 62. Now as evidence was offered to prove that the plaintiff prevented the collection of the execution, by fraudulent conduct; this, if established, was in violation of his duty as an attorney, and so the jury should have been instructed. As a consequence they should have been informed, that for his services rendered in procuring the judgment and execution, he has no legal claim.

From the motion it appears that the frustration of the suit against the sheriff was likewise occasioned by the fraud of the plaintiff. On this point the motion is very defective in not having pointed out the nature and circumstances of the fraud alluded to. As to the basis of my opinion, I will assume the facts to be as they were suggested in the argument, and as I understood, not contradicted; that having fraudulently defeated the collection of the execution, and having omitted to give any information of this fact to the defendant, the plaintiff was requested to bring a suit against the sheriff, which, by reason of the culpable act of the plaintiff, was defeated. To recover for his services in the action aforesaid, is one object of the present suit. I do not admit that any authority except what was originally given to pursue the requisite measures for collecting the defendant's debt, was legally necessary; but the consideration of this subject, as being of no importance in this case, I shall waive. Had the fact been fully known by the defendant, and after this, he had thought proper to invest the plaintiff with authority to bring the suit in question, I should not consider his services as invalidated, by the antecedent fraud. But the suppression of the truth, in this important particular, if such were the fact, was itself a fraud, and contaminated all the subsequent acts of the plaintiff.

On the supposition assumed, the plaintiff knew that by fraud he had prevented the collection of the execution, and that a recovery against the sheriff was impossible. With this knowledge not communicated to the defendant, but confined in his own breast, he commenced a hopeless suit, which, as he must have anticipated, was determined against his client. Having violated his duty by the perpetration of a fraud, and by this act occasioned to the defendant the loss of his debt, he now demands remuneration for his faithless services. The ground of a mere precedent, if it existed, must be unquestionable to sanc-

tion the reward of such misconduct, and much more, to authorize the establishment of a principle that will protect and invite results so flagrantly unjust. "All laws," as was said by Lord Kenyon in *Pasley v. Freeman*, 8 T. R. 51, "stand on the best and broadest basis which go to enforce moral and social duties;" and although the neglect of moral duties of imperfect obligation is not the ground of action, the palpable violation of a legal contract is always the subject of redress in the civil forum. The ground I assume, if the facts contended for by the defendants are true, is this: that there was fraud, not confined to a point, merely, but contaminating from beginning to end all the plaintiff's services.

As the result of my observations, I am of opinion that the judge below assumed that jurisdiction which exclusively belonged to the jury by directing them in relation to their verdict on matter of fact; that the opinion expressed by the jury, that an attorney had done all he was bound to do when he had delivered an execution obtained to the proper officer, except to receive the money when collected, and thus withdrawing from their consideration the fraud, to prove which evidence had been exhibited, was not correct; and that the omission to state to them the legal effect of the fraud committed by the plaintiff, by reason of which he recovered for services, when the law implied no contract in his favor, was erroneous. I would therefore advise a new trial.

PETERS and BRAINARD, JJ., were of the same opinion.

CHAPMAN and BRISTOL, JJ., dissented.

New trial granted.

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## BEERS v. BEERS.

[4 Conn. 526.]

**ACT ENLARGING JURISDICTION—TRIAL BY JURY.**—A statute enlarging the jurisdiction of justices of the peace is not repugnant to the constitution as impairing the right of trial by jury.

**IN ERROR.** The opinion states the case.

*Daggett and Sherman*, for the plaintiff in error.

*Shelton*, contra.

**HOSMER, C. J.** An action of trespass was brought before a justice of the peace, in which the plaintiff demanded thirty dol-

lars damages. To the declaration, the parties joined in demurrer, and the same having been considered sufficient, judgment was rendered for the plaintiff. The defendant below has instituted a writ of error, and for cause has specially alleged that the said justice ought not, and could not by the laws and constitution of the state of Connecticut, hold jurisdiction of the aforesaid cause, as he had no right to summon a jury, and therefore could not legally ascertain the facts in the case before him.

By the twenty-first section of the bill of rights, making a part of the constitution of this state, it is declared that "the right of trial by jury shall remain inviolate." At the time when the constitution was adopted, the jurisdiction of a justice of the peace, in actions of trespass, was limited to fifteen dollars, and the law since enacted, extending their jurisdiction to thirty-five dollars in cases of the above description, but authorizing an appeal to the county court when the sum demanded shall exceed seven dollars, is supposed to be unconstitutional.

I shall waive, as being unnecessary, the consideration of the broad question argued, whether the right of trial by jury would have been violated had there been no liberty of appeal. I admit that the trial by jury must continue unimpaired, and shall not now dispute that there can be no enlargement of a justice's jurisdiction which shall take from any one the legal power of having his cause heard by a jury, precisely as it might have been before the constitution was adopted. It is indisputable, that a justice of the peace is empowered to hear all causes personally, and that he cannot try them by a jury. The question then is brought to this narrow point, whether the enlargement of a justice's jurisdiction, with the right of appeal as it existed when the constitution was adopted, is a violation of the above privilege secured by that instrument. I am clear that it is not, and that a construction of this nature is equally unwarranted by the words and by the intention of the constitution. An instrument remains inviolate if it is not infringed; and by a violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are at least virtually of that character. It never could be the intention of the constitution to tie up the hands of the legislature so that no change of jurisdiction could be made, and no regulation even of the right of trial by jury could be had. It is sufficient, and within the reasonable intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to

new modes, and even rendered more expensive, if the public interest demand such alteration. A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury would be subject to the same considerations as if the object had been openly and directly pursued.

But on the other hand every reasonable regulation, made by those who value this *palladium*, of our rights, and directed to the attainment of the public good, must not be deemed inhibited, because it increases the burden or expense of the litigating parties. Such a degree of morbid sensibility may be excited on this subject, as to generate an opinion, that the legal requisition of a bond, the increase of jurors' fees and other trivial changes, although imperiously demanded to promote justice and the general convenience, if they only operate to subject the trial by jury to a burden, not unreasonable, are a violation of the constitution. The tendency to extremes, when an important interest is affected, is not uncommon, and it is not even undesirable, if it only lead to an anxious scrutiny. As the interests of a state, however, do not essentially depend on the existence of one right only, but on many, it is proper to preserve them generally, and not to sacrifice one important consideration to another equally important.

In conclusion, I am satisfied that the liberty of appeal in the case under discussion, preserves the right of trial by jury inviolate, within the words and fair intendment of the constitution, and that no such unreasonable hardship is put on the appellant by the bond required for the prosecution of the appeal, as to justify the assertion, that the right of trial by jury is in any manner impaired.

CHAPMAN, BRAINARD, BRISTOL, and PETERS, JJ., concurred.

Judgment to be affirmed.

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The constitutionality of acts enlarging the jurisdiction of justices as in this case, is generally sustained: See this topic discussed in Proffatt on Jury Trial, sec. 101.



CASES  
IN THE  
SUPREME COURT  
OF  
NEW YORK.

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**BIGELOW v. STEARNS.**

[19 JOHNSON, 39.]

**CURIA OF LIMITED JURISDICTION.**—If a court of limited jurisdiction issues illegal process, or takes cognizance of a cause without having jurisdiction of the person of the defendant, the proceedings are void, and if the magistrate attempts to enforce the judgment or decision, he is a trespasser, and the party affected may show collaterally that the magistrate had not jurisdiction of his person at the time of pronouncing such judgment or decision.

**STATUTORY JURISDICTION STRICTLY PURSUED.**—Where a new power is conferred on a magistrate by statute, it must be pursued in the mode prescribed. Accordingly, where a state authorized justices of the peace to cause to be brought before them persons accused of certain immoral conduct, and upon proof, to proceed to conviction, it was held that judgment pronounced against an alleged offender in his absence, after personal service of the summons, and though his father, as his guardian, appeared for him, was void.

**Action of trespass, assault and battery, and false imprisonment.** The jury found a verdict for the plaintiff for ten dollars, subject to the opinion of the court upon a case made, containing the following facts: The plaintiff had been committed to jail on a warrant issued by the defendant, as justice of the peace, for willfully interrupting a congregation of people met for religious worship, of which offense plaintiff had been convicted, and had neglected to pay the penalty adjudged of twenty-five dollars. The record of conviction was produced, which defendant contended was a complete justification, but plaintiff offered, and was permitted to introduce evidence to show that the defendant, as justice of the peace, did not cause the plaintiff to appear before him on the complaint, as the act required, before he recorded the conviction and issued his warrant of commitment.

The facts established by the evidence so introduced are stated in the opinion.

The cause was submitted without argument.

By Court, SPENCER, C. J. I had no doubt upon the trial that the conviction given in evidence by the defendant was a complete protection to him as to everything set forth in it, unless it was shown that the defendant had either exceeded his jurisdiction or had not jurisdiction of the person of the plaintiff. I consider it perfectly well settled that to justify an inferior magistrate in committing a person, he must have jurisdiction not only of the subject-matter of the complaint, but also of the process and the person of the defendant. This point was fully and ably discussed in *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; and it was decided that a judgment of divorce rendered by the supreme court of Vermont was void, because it had not jurisdiction of the person of the defendant. The authorities are numerous to this point: 5 Johns. 41; 8 Johns. 90, 197 [5 Am. Dec. 332]; Kirby, 119; 1 Dall. 261; 1 Day, 40, 45 [6 Am. Dec. 200]; 2 Wils. 386; 2 Str. 993. If a court of limited jurisdiction issues a process which is illegal and not merely erroneous; or, if a court whether of limited jurisdiction or not, undertakes to hold cognizance of a cause, without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void, and in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such a case, becomes a trespasser.

The case of *Mather v. Hood*, 8 Johns. 45, decides that a record of conviction of a justice, under the act to prevent forcible entries and detainers, is not traversable; and if it appears that the justice had jurisdiction and proceeded regularly, it is conclusive, and a bar to a suit against him for anything adjudged and within his jurisdiction. But it was not decided in that case, nor is there any case that sanctions the doctrine, that by force of a conviction before a magistrate, the party affected by it may not show, even in a collateral action where the conviction is set up as a defense, or comes in question, that the magistrate had not jurisdiction of the person against whom the conviction operates. Take the case of a person convicted by a justice of the peace who never had been summoned, and who never appeared before him; would it admit of a doubt that this fact might be shown, and if proved, that the whole proceeding

would be *coram non judice* and void? The fourth section of the act under which this conviction took place (2 N. R. L. 194, 195), after specifying the offenses of violating the Sabbath, and interrupting and disturbing any assembly of people met for religious worship, proceeds to denounce the penalty, and provides, in case such offender be legally convicted, that he shall immediately pay the sum so forfeited, which may be a sum not exceeding twenty-five dollars; and if he does not immediately pay the amount, with the charges of conviction, or give security to the satisfaction of the justice for the payment thereof within twenty days thereafter, then the justice may by warrant, under his hand and seal, commit the offender to the common jail of the county for a term not exceeding thirty days.

The ninth section provides, that every justice shall, upon information given upon the oath of any person, cause every offender against the act to appear before him, and upon such information being proved, shall convict such offender in such manner as in and by the act is prescribed. The tenth section gives the form of conviction, and prohibits the removal into the supreme court, by *certiorari*, of any adjudication or conviction by virtue of the act. The importance and value of the principle that the justice has not jurisdiction, unless the person convicted shall be legally before him, becomes more apparent when we perceive that the aggrieved party is deprived of every method of protecting himself but by action against the justice.

Was the plaintiff legally before the justice? I consider the process issued by the defendant as unexceptionable; it had no seal, and there is nothing in the act requiring it. The constable returned upon it that he had served it by reading. It appeared in evidence that the plaintiff was never before the justice; that the process was served by reading it to the plaintiff in the presence and hearing of his father, who now prosecutes as guardian *ad litem* to his son. The father requested the constable to delay the return of the process until the next day at ten o'clock, as he wished to take counsel, and that he would attend before the justice the next day for his son. This conversation took place when the officer served the process, and in the plaintiff's hearing and presence, and he did not object to the arrangement. The father appeared with counsel before the justice, and objected to the process and the manner of its being served, and insisted that the plaintiff ought to have been brought personally into court; these objections were overruled, and then Gale Bigelow withdrew with his counsel.

It is a settled principle that whenever a statute confers a new power upon justices of the peace they must proceed in the mode prescribed by the statute. Various British statutes confer power on justices of the peace, to inflict penalties for offenses, on conviction, without requiring that the party should be summoned or compelled to appear. In 4 Bl. Com. 382, it is said, the courts of common law have thrown in one check upon them (summary convictions), by making it necessary to summon the party accused before he is condemned; and it is now held to be an indispensable requisite: 2 Ld. Raym. 1405; 1 Salk. 181. It is evident that the summoning of the accused was not specifically required; yet this has been considered a principle so necessary to the impartial administration of justice, that it cannot be dispensed with. The statute authorizing the proceedings against the plaintiff, requires of the justice to cause every offender against the statute to be brought before him. This, I consider essential to his jurisdiction; first, because the statute is mandatory upon the justice that it shall be done, and it is the mode pointed out in which he shall execute the summary powers confided to him; and secondly, because, from the nature of the case, the offender must be present; the party convicted has an option given him of paying the forfeiture, or giving security for the payment in twenty days; in default of complying with either alternative, the justice is bound to commit him, for a period not exceeding thirty days. It is essential that the offender should have an opportunity of electing to comply with one of the alternatives offered to him, by being present and informed of the forfeiture adjudged. It is no answer to say, that being summoned he might appear. It was the duty of the justice to cause him to be brought before him. Neither is it an answer, that being an infant, he appeared by his father. It is not a suit in which there can be a guardian *ad litem*. Under the twenty-five dollar act, in a proceeding instituted by warrant, had the same facts occurred, the proceedings would have been erroneous.

Judgment for the plaintiff.

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See note to *Yates v. Lansing*, 6 Am. Dec. 290; *Grumon v. Raymond*, Id. 200; *Jones v. Hughes*, 9 Id. 364; *Gregory v. Brown*, 7 Id. 731.

## RANDALL v. VAN VECHTEN.

[19 JOHNSON, 60.]

**CONTRACT BY AGENTS OF MUNICIPAL CORPORATION.**—Where a committee of a municipal corporation, describing themselves as such, made a contract for the survey of the city and affixed thereto their individual signatures and seals, and the corporation had recognized their authority, it was held that the committee were not personally liable on the contract, but that the remedy was *assumpsit* against the corporation, the contract not being under the corporate seal so as to sustain an action of covenant.

**COVENANT.** Articles of agreement were entered into by the plaintiff Randall, and the defendants, a committee appointed by the corporation of the city of Albany. By these articles dated February 23, 1816, it was agreed that the plaintiff should survey the city of Albany without unnecessary delay, make maps, etc., and that the defendant should pay certain sums therefor, make reasonable advances, etc. The defendants signed their names and affixed their individual seals thereto. The declaration alleged part performance and offer to continue, and a refusal on the part of the defendants to permit plaintiff to proceed with his work, and refusal to make any payments. Plea, the general issue, with notice of special defense. Several resolves of the common council were produced in evidence from which it appeared that the corporation had recognized the authority of the committee to make the contract; and also the following, dated May 5th, 1817: "Resolved, that the contract on the part of the committee of this board and Mr. Randall, for the reasons and facts stated by the attorney to this board, is void, and at an end; and that a copy of this resolution be furnished to Mr. Randall."

Verdict for the plaintiff subject to the opinion of this court.

*Henry*, for the plaintiff, contended that he was entitled to recover of the defendants in their individual capacity; that the corporation could not be sued upon the contract, it not being made in their name: *White v. Skinner*, 13 Johns. 307 [7 Am. Dec. 381]; *Thyl v. Brewster*, 9 Id. 334 [6 Am. Dec. 280.]

*A. Van Vechten, contra.*

By Court, PLATT, J. Without scrutinizing the evidence, I incline to the opinion that there has been no breach of the contract on the part of the plaintiff, and that he has been willing to proceed in the proposed work without unreasonable delay. The fair construction of the evidence, I think, warrants

the conclusion, that the change of times had produced a change of views and wishes on the part of the corporation; that, in fact, it was inconvenient to make the progressive advances of money, and deeming it an improvident undertaking, they were willing and desirous to get rid of the contract. But the real question is, whether this is a personal covenant, binding the defendants individually, or is it a contract which binds the corporation only? There is a distinction between the contracts of public agents, who assume to act on behalf of government, and the contracts of private agents who represent individual persons or corporations.

In the first case, although the government cannot be sued, yet the agent is not personally liable, the public faith is the only security. But in the latter case, the person who assumes to contract as agent for an individual or a corporation, must see to it that his principal is equally bound by his act. For if he does not give a right of action against his principal, the law holds him personally liable: *Tippets v. Walker*, 4 Mass. 595; *White v. Skinner*, 13 Johns. 307 [7 Am. Dec. 381]; 7 T. R. 207; 3 Johns. Cas. 180; Cai. 254; 5 East, 148. In this case it is perfectly evident, that the defendants contracted in the character of agents for the corporation, in relation to a subject exclusively appertaining to the corporation, and according to the familiar and well settled rules applicable to agents and principals, the defendants are not personally bound in this case, unless the nature and form of the contract be such as to create no liability on the part of the corporation. The defendants signed and sealed this covenant, and the plaintiff was induced to enter into very onerous engagements, and to make large expenditures. The law will not, therefore, allow the defendants to treat this contract as a nullity, and in order to excuse them from personal responsibility, it is incumbent on them to show that the plaintiff has a legal remedy against the corporation. In my judgment they have shown, that for any breach in this agreement, in refusing to pay, or to make advances, the plaintiff has a remedy, by an action of *assumpsit* against the corporation. In the case of *White v. Skinner*, 13 Johns. 307 [7 Am. Dec. 381], a similar question arose, but there it was a point of special pleading, and the defendant was held liable, because he merely styled himself agent, and did not aver that he had authority to make the contract as agent. Here the question arises as a matter of evidence under the general issue and notice.

At the trial it was not made a question, whether the corpora-

tion had originally appointed the defendants their agents for making this contract. If that point had not been tacitly conceded we must now presume that a formal power of attorney, or, at least, a resolution of the board of the common council, for that purpose, would have been shown. But it is abundantly proved, by several formal resolves of the common council, that they recognized, adopted, and ratified this contract, by a variety of acts in express reference to it. They paid one thousand dollars, in various payments, to the plaintiff, on his presenting his bills for services and expenses, under this agreement, and these bills were charged not to the defendants, but expressly against the corporation. That the corporation on the one part, and the plaintiff on the other part, have mutually understood and acknowledged, that they were reciprocally bound, and that they were the real and only contracting parties, is apparent from the whole case. I cannot entertain a doubt, therefore, that these defendants have proved, under their notice, what, in the case of *White v. Skinner*, the defendant was required to aver in his plea, to wit, that they had lawful authority to bind their principals, according to the terms of the agreement.

But it has been contended that the action against the corporation cannot be in covenant, but can only be in *assumpsit*, because it is not a contract under the corporate seal; and that, if *assumpsit* were brought against the corporation, then it would be a good objection, that this contract is under seal; and that the *assumpsit* is merged in the specialty. This argument however, is not solid. It cannot be that the corporation is absolved because their agents used their private seals, in executing their agency. It is important here to remark the difference between a corporation and an individual person acting by an agent. In the one case there is a corporate seal, which is the only organ by which the body politic can covenant. The seals of these defendants are not, in any sense, the seals of the corporation; but the seal of an agent for an individual person as his principal, is, in law, the seal of his principal; and, therefore, it is, that the form of action against the principal, in the one case, (that of a corporation), is not determined by the form in which the agent contracts; while in the other case (that of an individual) the action against the principal must correspond with the form by which the agent contracts, whether by seal or by simple contract; nor will it make any difference whether the agents for the corporation were appointed under the corporate seal, or by a resolution in their minutes. It may legally be done in

either mode; and whether it be in the one mode or the other, cannot vary the form of action against the corporation.

When the real party to the contract has affixed his seal, the specialty implies a merger; and the opposite party cannot waive the covenant, and resort to the *assumpsit*. But this rule has no application here; because the corporation have not affixed their seal to this contract. The seals of the agents are not seals, as regards the corporation. I, therefore, see no bar to a remedy by an action of *assumpsit* on this agreement against the corporation. The old doctrine that *assumpsit* will not lie against a corporation is now exploded: *Bank of Columbia v. Patterson*, 7 Cranch, 297; *Danforth v. Schoharie T. Co.*, 12 Johns. 227; *Dunn v. Rector etc., of St. Andrews*, 14 Johns. 118.

We are, therefore, of opinion, that the verdict in this case ought to be set aside, and a nonsuit entered.

Judgment of nonsuit.

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The subject of this decision is examined in a note to *McDonough v. Templeman*, 2 Am. Dec. 510, and this case noted.

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## MOAKELEY v. RIGGS.

[19 JOHNSON, 69.]

**GUARANTY OF COLLECTION.**—Where, upon sufficient consideration, one guaranteed a note made and indorsed by others, to be “good and collectible after due course of law,” it was held that due diligence must be used to enforce payment both from the makers and the indorsers before the guarantor could be held liable, and that where no proceedings were commenced against the maker for seventeen months after the note became due, when he was discharged under the insolvent act, the guarantor was released.

**ASSUMPSIT.** The first count in the declaration stated that on April 18, 1817, in consideration that the plaintiff would sell certain goods to one Hull and take as security for the payment of the price a certain promissory note made by Hull and indorsed by Duncan and Rossiter, payable one hundred and eighty days from date, defendant “undertook, and then and there faithfully promised the plaintiff that the said note was good and collectible, after due course of law.” The declaration further averred, that confiding in this promise, the plaintiff sold the said goods to Hull, and took the said note as security; that at the maturity of the note a suit was commenced against the indorsers, and prosecuted to judgment, May 8, 1818, upon



which a *test. fi. fa.* was issued to the sheriff, who returned that there were no goods, chattels, lands or tenements in his bailiwick out of which to make the judgment; and that on the fifteenth day of March, 1819, the said Hull was duly discharged from his debts by a commissioner, under the statute. The defendant demurred to this count in the declaration.

*J. C. Spencer*, for the demurrer.

*J. King*, *contra*.

By Court, SPENCER, C. J. The first inquiry is, whether the defendant's liability under his engagement that the note was good and collectible after due course of law, did not depend on a condition precedent, to be performed by the plaintiff, the use of due diligence in attempting to collect the note by legal prosecution. It does not admit of a doubt that the defendant, who is a mere guarantor, can only be made responsible on the plaintiff's showing a performance on his part of the condition, on the observance of which the defendant consented to be answerable for the amount of the note. The defendant's undertaking that the note was good and collectible, after due course of law, imposed a necessity upon the plaintiff, if he meant to resort to his guaranty, to prosecute with due diligence all the parties to the note. The guaranty extends as well to the maker of the note as to the indorsers. The plaintiff accepted the note with the several and respective liabilities of the maker and indorsers; and his title to demand of the defendant the performance of the guaranty, depends on his showing, either that he has, with reasonable vigilance, pursued a due course of law, that is, commenced and prosecuted suits to effect, against all the parties to the note, and has thus ascertained that the note was not good and collectible, or he must set forth a legal excuse for omitting to do so. There is no averment that a suit has been prosecuted against Hull, the maker of the note, and the excuse is, that he was discharged from all his debts by a commissioner, pursuant to the statute, on the fifteenth of March, 1819.

Though the act of God, or the act of the law which renders the performance of an act stipulated to be done unlawful, may excuse a party from a strict compliance with his contract, as matter of defense, it may well be doubted, whether an engagement by one to perform an act, on the previous performance of another act by the other, can be enforced without showing the previous act done, or that its performance was dispensed with or prevented by him who was to perform the subsequent act.

Here, however, the very excuse set up is no answer to the objection made by the defendant, for seventeen months had elapsed after the note became due, before Hull was discharged from his debts. We know judicially that by the course of the court Hull might have been sued, and judgment obtained long before his discharge. Indeed, the plaintiff himself shows, that with respect to the indorsers, judgment was obtained against them on the eighth of May, 1818, more than ten months prior to Hull's discharge as an insolvent.

Courts are to interpret and enforce, not to make or alter the contracts of parties. The defendant has a right to insist that he entered into this guaranty, under the express condition that he was not to be liable unless the note turned out not to be good or collectible after a regular prosecution against the maker and indorsers of the note, with due and reasonable diligence. This is the substance of his engagement; and we think it cannot admit of a doubt; that the total omission to prosecute Hull, for the period of seventeen months, was a clear and culpable negligence, which absolved the defendant from his guaranty. We do not mean to say that a suit should have been brought forthwith, after the note fell due, but, at all events, a term should not have been lost. And when the defendant is regarded as a surety, most emphatically he cannot be bound beyond the scope of his engagement.

Judgment for the defendant with leave to the plaintiff to amend on payment of costs.

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## JOHNSON v. DAVERNE.

[19 JOHNSON, 134.]

**PROOF OF HANDWRITING.**—The handwriting of a party may be proved by a witness, who, in the course of dealing has received notes of the party, which have been paid upon presentation, and who, from knowledge thus obtained, swears that he believes the signature in dispute to be that of the party.

**ATTORNEY AS WITNESS.**—An attorney or counsel may testify to a collateral fact which he has ascertained, without being intrusted with it by his client; as, for instance, to the handwriting of his client, though he became acquainted with it after the suit commenced, but not by communication with the client.

**ASSUMPSIT** for work, labor, etc. After the plaintiff's evidence was closed, the defendant, in order to prove the plaintiff's signature to certain receipts offered in evidence, called a witness,

Campbell, who testified that he had never seen the plaintiff write, but had had dealings with and received promissory notes from him which had been paid, and that from these circumstances he was inclined to think the signature to the receipts was in the plaintiff's handwriting. On objection to the sufficiency of this testimony, it was excluded by the court. The defendant then called the plaintiff's counsel as a witness, who testified that he was acquainted with the plaintiff's handwriting; that he knew nothing of it until after he was retained in the case; and that he had no knowledge on the subject except what was communicated by his client, as counsel in the case. The witness submitted to the court whether he was bound to testify on that point, and the court held that he was not.

After a verdict for the plaintiff the defendant moved for a new trial.

*Caines*, for the defendant.

*Talcot*, *contra*.

By Court, *SPENCER*, C. J. To prove a party's signature, it is not indispensably necessary that the witness should have seen him write. *Phillips*, 367, gives the true rule: "The admissibility of the evidence must depend upon whether there is good reason to believe that the specimens from which the witness has derived his knowledge, were written by the supposed writer of the paper in question." In *Tiford v. Knott*, 2 Johns. Cas. 214, it was held that the signature of the indorser was well proved by a person who had been in the habit of seeing his correspondence, and from that circumstance believed the signature to be his. The witness in this case had received the plaintiff's notes, all of which, except one, had been paid; the payment of the notes, with his signature to them, unexplained, was a full admission that he had made and subscribed them. If, then, the witness had sufficiently observed, to ascertain the distinctive and prevailing character of the handwriting, he was in a situation to identify the plaintiff's signature, and he ought to have been asked, if he believed the plaintiff's name to the receipts to be his handwriting; if he had answered that question affirmatively, then the receipts should have been received in evidence.

The questions to the attorney and counsel were not pushed far enough. If he knew nothing but what his client had communicated to him, he could not be compelled to disclose that; but if he became acquainted with his client's signature, in any other manner, though it was subsequent to his retainer, he was

'bound to answer; for an attorney and counsel may be questioned, as to a collateral fact within his knowledge, or as to a fact which he may know, without being intrusted with it as an attorney in the cause: *Brant v. Kline*, 17 Johns. 338; 4 T. R. 431. There must be a new trial; the costs to abide the event of the suit.

New trial granted.

In the note to *Homer v. Wallis*, 6 Am. Dec. 169, evidence of handwriting is discussed. A good rule showing cases where evidence of this character may be admitted is given in *State v. Allen*, 9 Am. Dec. 616.

## BUCHANAN v. CURRY.

[19 JOHNSON, 157.]

**CONTRACT WITH ALIEN ENEMY.**—It is not unlawful, during a war, to discharge a contract with an alien enemy for the delivery of specific articles, as lumber, where the contract was made before the war, and such alien enemy has an agent, resident in the country, to receive the articles.

**SUBMISSION TO AWARD BY PARTNER.**—Though one partner cannot bind his copartner, by a writing under seal, to submit to an award, yet if after the award is made such partner accepts the amount awarded and indorses a receipt in full on the award, it bars the copartnership claim, being in the nature of a release, or an accord and satisfaction.

**COVENANT** on a contract made February 11, 1812, by which the plaintiffs agreed to deliver to the defendant, in the month of June following, certain lumber, the defendant covenanting to pay therefor at the rate of one shilling per foot, one half on the first of March, 1812, and the other half on the delivery of the lumber. The plaintiffs averred performance on their part, and a breach of the defendant's covenant by non-payment of the money. Pleas: 1. *Non est factum*; 2. Payment of half the price, and non-delivery of the timber for the other half; 3. A submission and award, etc.; 4. Payment, etc., with notice of special matter. To prove the execution of the contract, the plaintiffs, against the objection of the defendant, gave evidence of the handwriting of the subscribing witnesses, it appearing that one of them resided in Montreal, and that the other had been seen setting out for Canada, and it was understood, had removed there.

The remaining facts are stated in the opinion.

Verdict for the plaintiffs, subject to the opinion of the court.

*Z. R. Shepherd*, for the plaintiffs.

*Wheeler*, contra.

By Court, PLATT, J. On the part of the plaintiffs, I think the contract was duly proved, and also that they delivered the quantity of timber according to contract, viz., to the defendant's agent, Niel Livingston, who resided during the spring and summer of 1813 at French Mills, in the county of Franklin. The evidence to establish such agency is clear and satisfactory, and the plaintiffs proved a receipt in the following words, viz: "Salmon River, June 30, 1812. This day was culled by John Hurnden the remainder of the eight thousand feet of square oak timber, agreeable to Walter and Robert Buchanan's contract with John Curry, bearing date the eleventh of February, 1812, and was examined and received by me, according to my advice from William Johnson, Esq. Niel Livingston." The defendant proved by Joshua T. Cozens, that Walter Buchanan had acknowledged to him that the defendant had paid the advance money; that is, eight hundred dollars, payable first of March, 1812, according to contract. It was proved that Robert Buchanan, one of the plaintiffs, was a naturalized American citizen, and resided at French Mills, in Franklin county; and that Walter Buchanan, the other plaintiff, and the defendant, John Curry, were British subjects, and resided in Canada during the late war.

The places of delivery named in the contract are so general that the plaintiffs had an election to deliver the timber within the United States or in Canada. And it does not appear whether it was actually delivered in Canada or in the United States. Nor does it appear how much of the timber was delivered before the declaration of war (June 18, 1812), or how much afterwards. A part, however, to complete the contract, was delivered, as appears by the receipt, at "Salmon River, on the thirtieth of June, 1812." The first ground of defense was that the war dissolved the contract, and that it became unlawful to fulfill such an agreement between the defendant, who was an alien enemy residing in Canada, and one of the plaintiffs, who was an American citizen, resident here.

To have transported the timber into Canada, pursuant to the contract, during the war would have been unlawful; and so far the contract was dissolved or restrained by the change from peace to war. But upon the supposition, which is well warranted by the proof, that the defendant, an alien enemy residing in Canada, had an agent resident at French Mills, within the United States, who received the timber due on this contract during the war, at places within the United States, I see noth-

ing unlawful or inconsistent with the duty of allegiance, in the mutual performance of the contract in such a manner during the war. If such a contract had been entered into during the war, it would have been illegal and void. But this agreement appears to have been made before the war, in good faith, and according to the usual course of business. There is no ground for the position taken by the defendant's counsel, that it was unlawful for the contracting parties voluntarily to carry this prior agreement into effect by delivering and receiving the timber, within the United States, during the war. The war suspended the remedy by suit on the contract, but it is not unlawful voluntarily to pay debts, or perform contracts to alien enemies, if the payment be made, or the duty be performed in our country.

The rule is founded in public policy, which forbids, during war, that money or other resources, shall be transferred, so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy; not in delivering it to an alien enemy, or his agent, residing here, under the control of our own government.

Suppose an American citizen, previous to the war, had contracted to furnish a quantity of flour or cotton to a British merchant, to be delivered to his agent at the port of New York would a declaration of war between the two nations render it unlawful to fulfill the contract? I think not. In such a case, the interests of commerce are perfectly compatible with the rights of war; and public policy does not forbid the transfer. None of the authorities cited, support the doctrine contended for by the defendant on that point.

In the case of *Clarke v. Morey*, 10 Johns. 69, it was decided that an alien resident in the United States, during a war between his country and the United States, may sue and be sued, as in peace. If he may sue *a fortiori*, he may receive payment without suit. Emerigon, 1 Trait. des. Ass. 567, says: "*Les creances que l'etranger a chez vous, lors de la declaration de guerre, subsistent en leur entier. S'il est force de se retirer, il lui est loisible de laisser sa procuration a un ami pour exiger ce qui lui est du, et pour actionner ses debiteurs en justice.*" In *Conn v. Penn* and *Deniston v. Imbrick*, circuit court of United States, Pennsylvania, Judge Washington decided that debts might be paid to the agent of an alien enemy residing here, but that no remittance could be made during war.

The defendant also relies upon a submission and award, to

ber this suit. It appears that on the seventh day of April, 1813 (during the war), at Cornwall, in Upper Canada, Walter Buchanan (one of the plaintiffs), entered into formal bonds of submission to arbitration, with the defendant, of all matters in difference between these plaintiffs and the defendant, embracing the very claim now before us. Walter Buchanan signed and sealed the arbitration bond, for Robert Buchanan, as well as in his own right; Robert then being a citizen of the United States, and resident here. An award was made pursuant to the submission on the seventh of April, 1813, whereby the defendant, John Curry, was required to pay to the plaintiffs, on account of this timber, seventy-three pounds sixteen shillings, lawful money of Upper Canada, on or before the first of June, then next. The defendant gave in evidence a receipt, indorsed on the award, in these words, viz: "Received, Montreal, twentieth July, 1813, from Mr. John Curry, seventy-four pounds seven shillings three pence, it being the amount of this award with interest. Walter Buchanan."

To this award the plaintiffs' counsel objects: 1. That on the authority of *Griswold v. Waddington*, 15 Johns. 57, the war dissolved the partnership between Walter and Robert Buchanan; and, 2. That Walter could not, as partner, seal a bond of submission so as to bind his copartner, Robert, and that no special authority for that purpose was given, or could be given, by Robert to Walter, during the war. In my judgment, these objections are not well founded. Although the war dissolved the partnership, yet the effect was no greater than if the partnership had been dissolved by the mutual agreement of the partners. In that case, neither of them could any longer make any new contract to bind the other, but either of the former partners would have a right to receive payment, or settle the concerns of the partnership. The dissolution is prospective merely. It is true, that strictly speaking, one partner cannot, as such, bind his copartner under seal to comply with an award. And it is clear that Robert Buchanan is not bound by this, technically, as an award. But I think it has the effect of extinguishing all claims on behalf of these plaintiffs arising out of that contract. There was a claim for money due on the contract, as the price of the timber. Walter Buchanan and the defendant, being together in Canada, could not adjust it; and in order to determine the true balance, they agreed to submit the question to arbitration. The arbitrators reported a sum as due upon the contract; and the acting partner there agreed to accept it, and gave a

receipt on the back of the award, declaring that he was satisfied with that adjustment of the claim. Now it is clear that the award is binding on Walter Buchanan, whatever may be its effect as to Robert.

In *Strangford v. Green*, 2 Mod. 228, the court said: "The defendant may undertake for his partner, and having engaged, for himself and his partner, to perform the award, notwithstanding the partner is not bound, yet if he refuses, it is a breach of the defendant's promise:" Kyd on Awards, 42. I think Robert is also concluded by that award, after payment of the sum awarded, considering it as a compromise or liquidation of the claim, which Walter was authorized to make in virtue of his general authority as partner in that contract. Here had not only been an award, but the sum awarded as a full satisfaction for the timber has been accepted as such by Walter Buchanan. If all this had been done without sealing the submission, it would undoubtedly have concluded Robert, as well as Walter. The partnership demand would have been extinguished, and as it regards this suit, I think the effect is the same, whether the final balance due on the contract was liquidated and paid by mutual agreement of the defendant with one of the partners, or through the intervention of arbitrators. It operates in the nature of a release by one partner, or as an accord and satisfaction. In *Bacon v. Dubarry*, 1 Salk. 70, Holt, C. J., said "that money paid and accepted, in pursuance of a void award, might be pleaded or taken as an accord with satisfaction." In my view, therefore, it is immaterial whether the bonds of submission were duly proved at the trial or not. The receipt of Walter Buchanan on the award is in itself sufficient to bar this claim. We are of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

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## EARLY v. MAHON.

[19 JOHNSON, 147.]

**USURIOUS LOAN—NEW PROMISE, WHEN VALID.**—Where a judgment entered on a bond and warrant of attorney given as security for a usurious loan, was set aside without declaring the bond void, and the defendant afterwards promised to pay the sum actually lent, it was held that this promise was valid and would support an action of *assumpsit*, and that the plaintiff would be entitled to judgment thereon, on bringing in the usurious securities for cancellation.



**ASSUMPT** on an express promise. The facts were: The plaintiff loaned a sum of money to the defendant, who gave a bond and warrant of attorney to pay the same, with usurious interest. Judgment was entered on the bond, which was afterwards set aside, on motion, on the ground of usury. The defendant then promised to pay the sum actually lent, without the usurious interest, which was the promise now sued on. The plaintiff brought in the bond and warrant of attorney to be cancelled. Verdict for the plaintiff, subject to the opinion of the court.

*Sherwood*, for the plaintiff.

*Sudam*, *contra*.

By Court, SPENCER, C. J. There are two questions presented by the case: 1. Whether when money has been lent upon an usurious contract, and the contract is afterwards vacated, there yet exists such a moral and equitable duty on the part of the borrower, that a subsequent promise by him to pay the money actually lent, can be enforced at law, in an action founded on the promise? 2. Whether we are to consider the original usurious contract, in this case, as put out of question, either on the ground of its being void, or on the ground that the judgment has been vacated?

1. The case of *Barnes v. Headley*, 2 Taunt. 182, contains all the authorities and decisions in the British courts, on the first point; and in my opinion, places the validity of the promise, and the sufficiency of the consideration, beyond a doubt. In that case, the original security was confessedly usurious; it was by mutual consent, delivered up and cancelled, and the borrowers promised to repay the principal and interest. And it was decided that the plaintiffs were entitled to recover the principal and legal interest. It was an issue out of chancery, and the judges merely certified the result of their decision, without giving their reasons at large. It has been repeatedly decided in this court, that an equitable or moral duty is a sufficient consideration for an actual promise to pay. In *Hawkes v. Saunders*, Cowp. 289, Buller, J. said: "If such a question were stripped of all authority, it would be resolved by inquiring, whether law were a rule of justice, or whether it was something that acts in direct contradiction to justice, conscience and equity; but (he added) the matter has been repeatedly decided." I consider it entirely settled, that notwithstanding the security be usurious, the money lent is a debt in equity and conscience, and ought to

be repaid. This principle has long been acknowledged, and acted upon in courts of equity: 2 Ves. 567; 2 Br. Ch. Cas. 649. In the latter case, upon an application to set aside a judgment tainted with usury, it was decided that it could be displaced only by doing what was just, and that it must stand for the money actually paid with legal interest. In *Rogers v. Rathburn*, 1 Johns. Ch. 367, the chancellor pronounced it to be a settled principle, that he who seeks equity must do equity; that if the borrower came into court for relief against his usurious contract, he must do what is right, as between the parties, by bringing into court the money actually advanced, with the legal interest; and that there the court would lend him its aid as against the usurious excess. The statute to prevent usury, (1 N. B. L. 64,) after regulating the rate of interest, and forbidding a higher rate than seven per cent. per annum to be taken, declares that all bonds, bills, notes, contracts and assurances upon, or for any usury, by which there shall be reserved, or taken, or secured, or agreed to be reserved or taken above seven per cent., shall be utterly void.

This provision of the statute relates wholly to the contract, and it makes that entirely void. Hence, it has been frequently held, that where there was an antecedent valid debt, and a security was given by the debtor, reserving illegal interest so as to be usurious, that the security being void, the pre-existing debt might be recovered, if even the security was one of a higher nature: 3 Camp. N. P. 119; 1 H. Bl. 462. I do not mean to say, that in this case, the plaintiff can recover, on the ground that the defendant has had his money, and the bond he took for it was void, and that, therefore, he can maintain an action on the implied *assumpsit*. Here the lending and the usurious agreement were contemporaneous acts; the usury infected the whole transaction, but I do not say, in the words of Mr. Justice Lawrence, "the usury could not annihilate the sum of money itself, nor the fact of the receipt of the money," and it does not admit of a doubt, that the defendant having had the plaintiff's money, without any consideration or security, but a void bond, the promise subsequently to repay this money, was founded on a moral and equitable duty. In *Fitzroy v. Gwillim*, 1 T. B. 153, in trover for goods which had been pledged for money advanced on an usurious contract, it was held, that to entitle the plaintiff to recover, it was necessary to prove a previous tender of the money actually due. This was a recognition by a court of law, of the principle adopted in courts of equity;

that although the contract was void, there was yet a subsisting duty on the part of the borrower. It is observable, too, that the plaintiff has not committed an act which is *malum in se*, but *malum prohibitum* merely, and this distinguishes this case from giving money to one to commit a crime. In such case, it could not be recovered back even upon a promise to restore it, and, it is to be borne in mind, that the present contract is free from usury.

2. Upon the second point, the case shows that the contract was, that a bond and warrant of attorney were to be given to secure the loan, and they were given accordingly. Judgment was entered up by virtue of the warrant, and that judgment has been set aside. The court which set aside the judgment did not, however pronounce the bond to be void. The case of *Scarfield v. Gouland*, 6 East, 241, bears strongly on this part of the subject. In that case, the defendant had granted to the plaintiff an annuity, secured by a deed, bond, and warrant of attorney, on which judgment was entered. The defendant applied to set aside the judgment for a mistake in the memorial, and to have the securities cancelled. The court set aside the judgment, but made no order as to the deed or bond, and there was no proof of any offer to cancel them. The plaintiff brought an action for money had and received, to recover the money advanced, and the objection was taken that *assumpsit* would not lie, the plaintiff still having his remedy on his bond and deed. Lord Ellenborough held that the plaintiff had contracted for an entire assurance, consisting of several securities; that the defendant had taken away one of his securities, and therefore the consideration for the money had failed, and the court gave judgment for the plaintiff. I think, however, that the positions advanced by the counsel are more forcible than the reasons given by the court. They urged that the defendant having neglected to set aside the annuity, and the court having pronounced judgment upon its illegality, and vacated the warrant of attorney and judgment given to secure it, it was not competent to the defendant to set up the objection, upon the ground that the annuity was still secured by subsisting instruments, the illegality of which had been declared, and it was nugatory to oblige the plaintiff to bring his action, in the first instance, on the bond or deed, to put the defendant to plead the special matter, and to show they were void under the annuity act, in order to enable the plaintiff afterwards to bring his action to recover the money advanced.

This appears to me to be conclusive reasoning, and directly applicable to this case. The defendant has procured the judgment entered on the bond to be set aside, on the ground that the bond was void for usury, and he has thus deprived the plaintiff of one of his securities, and prevented his entering up a new judgment. The defendant cannot be heard to say in opposition to his own act, and the solemn judgment of the court to which he applied, that the bond is a valid instrument. The defendant and the court have pronounced the bond to be void, and the plaintiff admits that it is void, and has produced it in court with an offer to cancel it. It would be nugatory to compel the plaintiff to sue on the bond, that the defendant might avoid it by pleading the usury. I am entirely convinced that there is no force in the objection, and am of opinion that the plaintiff should have judgment, stipulating to cancel and put on file the bond and warrant of attorney, and the first note.

Judgment for the plaintiff.

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### FOOT v. SABIN.

[19 JOHNSON, 154.]

**PARTNER'S POWER TO BIND FIRM AS SURETY.**—A partner has no power to bind his copartners, without their assent, by signing the firm name as sureties on the note of a third person, and the burden is on the creditor to prove the assent.

**ERROR** to the common pleas, in an action on a promissory note made by one Holmes, to which the names of Wilson and Foot were signed as sureties. Holmes and Wilson pleaded jointly *non-assumpsit*, and Foot pleaded separately *non-assumpsit*, and also, in bar, that Wilson, his copartner in trade, had signed the firm name to the note without his consent, which was traversed by the plaintiff's reply. The facts are stated in the opinion. At the trial the defendants moved for a nonsuit, on the ground that the plaintiff had not proved the consent of Foot to the making of the note, but the court held the consent sufficiently proved, and overruled the motion. Verdict for the plaintiff. The bill of exceptions disclosed the fact that when the plaintiff rested, and the motion for a nonsuit was interposed, there was no evidence to show that Foot had assented to the making of the note, but there appeared on the record, after the signatures of the judges to the bill of exceptions, a statement of certain facts, said to have been proved by the defendants, going to show

that Foot had consented to the signing of the firm name to the note by Wilson.

The case was submitted on the record and the points stated.

By Court, ~~SHREWER~~, C. J. I cannot consider the facts spread upon the record subsequent to the attestation of the judges to the exceptions taken by the defendants below, as legally before us. We find these facts on the record, but they are placed there by the plaintiff's attorney, in making up his judgment roll, without the apparent sanction of the court below. It is the business of a court of errors to review the points decided in the courts below, and as to which exceptions are taken, and not such matters of evidence as are not excepted to. When the plaintiff rested his cause, and the defendants moved for a nonsuit, he should have asked permission to introduce such further evidence as he had, before the court expressed an opinion on the motion, or he should have had the evidence, afterwards given, incorporated into the bill of exceptions, before it was signed and sealed, if such additional evidence, in his judgment, entitled him to recover.

The plaintiff proved Holmes' signature to the note, and also, that Wilson and Foot were partners, and that Wilson signed the name of the firm, and it appeared on the face of the note, that they signed as "sureties" to Holmes. Whether we apply this proof to the general issue, or to the special plea, the plaintiff has not maintained either issue. It was incumbent on him to show, that all the defendants were liable on the note, and that Wilson executed the note with the express assent and authority of Foot. In this case, it appearing that the signature of the name of the firm, by Wilson, was not for a partnership debt, Wilson could not bind his partner Foot.

All the cases were reviewed in *Dobb v. Halsey*, 16 Johns. 38 [8 Am. Dec. 293], and the principle established is this, that where a note is given in the name of the firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partner is not bound, unless he has been previously consulted, and has consented to the transaction; and then the burden of the proof that the partner who did not sign the note consented to be bound, is thrown on the creditor. The same principle applies with greater force, when one of the partners becomes security for another person, and attempts to bind his copartners. The creditor is aware that he is pledging the partnership responsibility in a matter in no wise connected with the partnership business,

and that is a fraud on such of the partners as do not assent expressly that the firm shall be bound. When, therefore, it appeared, from the plaintiff's own showing, that the note was signed by Holmes, as principal, and by Wilson, with the name of the firm of Wilson & Foot, as sureties for Holmes, nothing was shown to bind Foot, and the plaintiff failed to maintain the issue. On the motion for a nonsuit, the court held that the plaintiff was bound to prove the authority or consent of Foot to the making of the note, which the court considered he had done. There was no proof of any authority or consent of Foot, except the proof of the signature of Wilson, of the name of the firm. The court then certainly drew a very incorrect legal inference from the fact proved.

The only remaining question is, whether there was error in not nonsuiting the plaintiff. In the case of *Pratt v. Hull*, 13 Johns. 334, it was decided that a court of common pleas may compel a party to be nonsuited, without and against his consent, when, in their opinion, the evidence offered by him does not support his action, and there are no questions of fact to be weighed and considered by the jury. It was also decided in that case that a bill of exceptions would lie to the decision of the common pleas upon a motion for a nonsuit, if such opinion was upon a mere matter of law arising upon facts not disputed. This court may not have intended, in that case, to say that a writ of error would lie to the decision of the common pleas, when they nonsuited the plaintiff upon a point of law, but I perceive no difference in the cases; if a court can rightfully nonsuit the plaintiff upon an undisputed state of facts, when the law is against him, they ought to do so; and the refusal to do it is an error in point of law. It ought not to be left with the common pleas to nonsuit the party when he has entirely failed to make out his case, or to omit to do it, capriciously. In the case last cited, we say that the power of nonsuiting the plaintiff must be vested in the court, that it results necessarily from their being made the judges of the law of the case, when no facts are in dispute, and that otherwise there is no meaning in what has been considered a salutary rule in courts of justice, that to questions of law the judges are to respond.

In many of the courts of common pleas, there are no judges of the degree of counsellors of this court, and of course no new trials can be had, however outrageous the verdict may be, in point of amount, or however unsupported by evidence. In fact, in courts thus constituted, having no power to grant new trials,

the citizen may be deprived of the benefit of the laws made for the protection of his rights and property. In my judgment, we ought, as far as the law will permit, to give facility to suitors, by extending to them the right of taking their exceptions, so as to have the law applicable to their cases examined on a writ of error. On the ground, then, that the court of common pleas refused to nonsuit the plaintiff below, when the evidence adduced entirely failed to make out his case, the judgment must be reversed, and a *venire de novo* issue from this court. It has not been made an objection that the writ of error is prosecuted solely in the name of Foot. I presume that the defendants below have been secured, or that the parties have waived all objection on that ground.

Judgment reversed, and a *venire de novo* awarded, returnable in this court.

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### TROTTER v. CURTIS.

[19 JOHNSON, 160.]

USURY IN TAKING COMMISSION.—Where commission merchants were in the habit of receiving and forwarding to New York produce sent to them by a country merchant, and of accepting his drafts, and charging two and a half per cent. commission, in addition to interest, on advances made to meet these drafts, when he had no funds in their hands, it was held that the charge was not usurious, it appearing that it was not a cover for a loan, and that this was the practice of other merchants engaged in similar business.

ASSUMPTIO to recover the balance of an account in favor of the plaintiffs, who were commission merchants, against the defendant, a country merchant. One item in the account was for a commission of two and a half per cent. charged by the plaintiffs, in addition to interest, on certain advances made by them to meet drafts of the defendant, to which the defendant objected, on the ground of usury. It appeared to have been the practice of the plaintiffs for several years to receive and forward the plaintiff's produce to New York, and to accept his drafts, with the understanding that the produce should be in their store before the drafts became payable, and they had uniformly charged the commission now objected to on advances to meet these drafts. It was proved also that this was the custom of other commission merchants.

Verdict for the plaintiffs, subject to the opinion of the court.

McKoun, for the plaintiffs.

L'Amoureux, contra.

By Court, SPENCER, C. J. There is no pretense for saying that the commission of two and a half per cent. charged by the plaintiff for accepting and paying the defendant's drafts, when the plaintiffs had not funds in their hands belonging to the defendants, out of which to pay the drafts when due, was usurious. There is nothing in this case showing that this was a cover for the loan of money, but it was charged and assented to by the defendant, as a reasonable compensation for the expense and trouble in negotiating the business in relation to the drafts. It is entirely a different case from that of *Dunham v. Day*, 13 Johns. 40, and from the cases in 1 Campb. 177 and 2 Id. 599. In *Auriol v. Thomas*, 2 T. R. 52 (and in the notes), Mr. Justice Buller, in the principal case said, that in *Benson v. Parry*, the court were unanimously of opinion that extra charges might be allowed, though they amounted to more than five per cent., if they were fair and reasonable, and not as a color for usury. These remarks were applied to the claim of country bankers taking more than five per cent. on inland bills. Judge Buller mentioned several other cases in which the usage to take not only five per cent. but also a reasonable sum for remitting and other necessary incidental expenses, had been sanctioned by the court.

In *Palmer v. Baker*, 1 Mau. and Sel. 56, the question was, whether the sum of two hundred pounds agreed to be allowed, as a compensation for trouble in addition to the reservation of five per cent. interest, was intended as an additional *bonus* for the advance of money or not. The judges placed their determination of the cause on the inquiry, whether the reservation was a motive for the advance of the money. If it was, they pronounced it usurious; but if it was referable to the trouble only, then they pronounced the transaction a fair one. I am perfectly satisfied, that in this case the two and a half per cent. was never intended as a cover for the advance of money with a usurious intention, but it was a fair, usual, and customary allowance for the trouble and inconvenience in transacting the business; and that, accordingly, the plaintiffs must have judgment for one hundred and forty dollars and fifty-four cents.

Judgment for the plaintiffs.

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See *Fanning v. Dunham*, 9 Am. Dec. 233, where the taking of a commission was held usurious.



## ANDREWS v. MONTGOMERY.

[19 JOHNSON, 132.]

JUDGMENT OF SISTER STATE, EFFECT.—A judgment fairly obtained in another state is conclusive evidence of a debt, and since it is a debt of record *assumpsit* will not lie thereon.

**ASSUMPSIT** on a judgment recovered in the court of common pleas of Essex county, New Jersey, to which the defendant pleaded: 1. *Non-assumpsit*; and, 2. A discharge under the insolvent act. The plaintiff objected to the discharge as a defense because the cause of action arose in New Jersey. The defendant, however, insisted that the discharge was a valid defense and, also, that the action should have been debt and not *assumpsit*. Verdict for the plaintiff, subject to the opinion of the court.

*H. Warner*, for the plaintiff.

*Drake*, contra.

By Court, SPENCER, C. J. In *Hitchcock v. Fitch*, 1 Cai. 461, it was decided by a majority of the judges, that a judgment rendered in the supreme court of Vermont, and on which an action of debt was brought in this court, was to be considered in the light of a foreign judgment, and was only *prima facie* evidence of the demand. As a necessary consequence of this decision, judgments rendered in one of the sister states, were considered only as simple contract debts: *Hubbel v. Cowdry*, 5 Johns. 132. It was subsequently decided, that in order to rebut the *prima facie* evidence of the validity and justice of such judgments, the defendant must show their injustice, or that they had been unfairly and irregularly obtained, and that matters proper for the determination of a jury, and which appeared, from the record, to have been fairly submitted to them, cannot be overhauled. When it appeared that the defendant was never within the jurisdiction of the court, or where goods only have been attached, the effect of the judgment may be avoided: *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225], and the cases there cited.

In the case of *Mills v. Duryee*, 7 Cranch, 481, decided in the supreme court of the United States, an exposition was given of the constitutional provision, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may, by general laws, prescribe the manner in which such acts, records, and

proceedings, shall be proved, and the effect thereof," and also of the acts of congress of the twenty-sixth of May, 1790, providing the mode of authenticating the records and judicial proceedings of the state courts, and declaring, "that the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are, or shall be taken." Mr. Justice Story, who pronounced the judgment of the court, says it is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument, he says, cannot be supported. The act declares that the record duly authenticated shall have such faith and credit as it has in the state court from whence it is taken. If, in such court, it has the faith and credit of evidence of the highest nature, to wit, record evidence, it must have the same faith and credit in every other court. Congress have, therefore, declared the effect of the record, by declaring what faith and credit shall be given to it. It remains only, then, to inquire, he adds, in every case, what is the effect of a judgment in the state where it is rendered. And he proceeds to observe, that if the judgment was conclusive upon the parties in the state where it is rendered, it must be conclusive here also. Upon these principles it was decided, that *nil debet* to an action of debt on a judgment rendered in another state was a bad plea, and that the judgment could only be denied by the plea of *nul tiel record*.

In *Borden v. Fitch*, this court did not believe that the decision in *Mills v. Duryee*, was intended to be carried so far as to preclude the party against whom it was rendered, from showing that such judgment was fraudulently obtained, or that the state court had not jurisdiction of the person of the defendant. With these qualifications, we are bound by the authority of that case, to consider a judgment, fairly and regularly obtained in another state, as full and conclusive evidence of the matter adjudicated. In the present case we are bound to consider the judgment set forth in the declaration, as a debt of record due from the defendants to the plaintiff. Independently of the consideration, that a decision of the supreme court of the United States is entitled to the highest respect, in all cases, a decision upon provisions of the constitution, is emphatically entitled to our utmost respect. I consider that court as paramount, when deciding on an article of the constitution, and an

act of congress passed under its express injunction; and whatever might be my individual opinion, I should feel it my duty to surrender it to their controlling authority. I must, however, be permitted to say, that the opinion expressed by Mr. Justice Story, coincided entirely with my private opinion; and that I have never believed the decision in *Hitchcock v. Fitch* to be well founded.

The plaintiff has counted upon the judgment in New Jersey, as a simple contract; and, accordingly, it is set forth as a promise to pay the amount adjudicated. Now, it is well settled, that *assumpsit* cannot be supported, where there has been an express contract, under seal, or of record; but the party must proceed in debt or covenant, where the contract is under seal, or in debt, if it be of record, even though the debtor, after such contract were made, expressly promised to perform it, 1 Chit. 94, and the numerous cases there referred to. In *Pease v. Howard*, 14 Johns. 479, this court decided that a judgment in a justice's court was not within the statute of limitations, like a foreign judgment, and that it was in the nature of a specialty. The judgment recovered in New Jersey being admitted by the pleadings, and standing totally unimpeached, we are bound to consider it as fairly and justly obtained, and as establishing a debt of record against the defendant. It is not, therefore, merely *prima facie* evidence of a debt, like a foreign judgment, but absolute and decisive evidence of a debt; *assumpsit* then will not lie upon it, and without examining the pleas, as it is impossible to support the plaintiff's action, be they ever so bad, the defendant must have judgment.

Judgment for the defendant.

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See note to *Bartlet v. Knight*, 2 Am. Dec. 36; and see *Aldrich v. Kinney*, ante, 151.

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## UNDERWOOD v. STUYVESANT.

[19 JOHNSON, 181.]

**ACCEPTANCE OF STREETS BY CORPORATION.**—Streets laid out by a town proprietor do not become such unless sanctioned by the corporation or its duly authorized officers.

**GRANTING LOTS ON UNACCEPTED STREETS.**—Where a proprietor of a tract of land in a city, laid off streets therein, which were never accepted by the corporation, and leased lots bounded on such streets, and afterwards the proper authorities established streets through said tract without reference to those thus laid out, it was held that the proprietor was not bound to keep open the streets mentioned in his leases, if the lessees had a reasonable and convenient way to a public street or highway.

TRESPASS on the case for obstructing a certain street, or private way, called Peter street. Petrus Stuyvesant, the father of the defendant, being the owner of a tract of land in the city of New York, called Petersfield, laid off the same in the year 1796 into streets, lots and blocks, and had a map made thereof. One of the streets so laid out was named Peter street. Subsequently the said Stuyvesant and, after his death, the defendant, who was his devisee, leased certain lots according to said map, bounded on said Peter street, to the plaintiff, and to others, who assigned their leases to the plaintiff, for terms varying from twenty-one to forty-two years, each of the leases containing a covenant on the part of the lessee to level and pave the street opposite his lot. None of the streets laid out by Stuyvesant were ever accepted or adopted by the city or by any public authority. Peter street was, however, partly opened. In 1811 commissioners appointed pursuant to an act of the legislature of April 3, 1807, providing for laying out streets, etc., in the city of New York, divided the Petersfield tract into streets, avenues, blocks, etc., without reference to the plan of Petrus Stuyvesant, leaving no thoroughfare along Peter street, but including the same within blocks. The defendant accordingly, in August, 1815, erected a fence across Peter street at the eastern extremity of the plaintiff's lot, and built a house standing partly in said Peter street. The building of this fence and house was the obstruction complained of. It appeared that the plaintiff had a reasonable and convenient outlet from his premises to the Bowery road, but he also claimed a permanent right of way eastwardly along Peter street.

There was a verdict for the plaintiff, and a motion for a new trial by the defendant.

*Slosson and D. B. Ogden*, for the defendant.

*T. A. Emmet*, for the plaintiff.

By Court, PLATT, J. From the best consideration which I have been able to give to this case I incline to the opinion, that the plaintiff has no right of action. The original survey and map show that Petrus Stuyvesant formed a plan for laying out streets over his land, in 1796; but we must intend that every person knew that, that those streets could not be established as public streets of the city unless they were sanctioned by the corporation, or other public agents having such powers. The plan was considered as a proposition which the corporation would undoubtedly adopt and sanction, as the city gradually

extended. There is no pretense of any fraud or deception on the part of the defendant or his father. It must have been well understood by the parties to those leases, that the ground marked for the proposed streets was to be given and appropriated for that purpose, provided the streets were sanctioned and adopted by public authority. The implied contract on the part of Mr. Stuyvesant was substantially this: I engage to give the ground for the streets, according to the map, upon condition that the corporation shall ratify it.

By the map of the city, made by Goerck & Mangin, city surveyors, in November, 1803, the streets planned by Mr. Stuyvesant are all laid down, but with an explanatory note, stating that none of those streets had been approved and opened by the corporation; and "they are, therefore, to be considered subject to such future arrangements as the corporation may deem best calculated to promote the health, introduce regularity, and conduce to the convenience of the city."

The parties mutually contracted with a reference to the contingency, whether the government would or would not sanction the streets proposed by the proprietor. Suppose, then, that the corporation had expressly rejected the plan of Mr. Stuyvesant, and had laid out streets over the same ground on an entirely different plan, would the lessee have a right to insist on the fulfilment of the conditional agreement on the part of the lessor? I think not. The expected contingency would in that case have failed, without any fault or delinquency on the part of Mr. Stuyvesant. The *casus forderis* would not have occurred, and the parties would have been mutually absolved from their contract in relation to the streets. Perhaps a court of equity would have cancelled or modified the lease, on the ground that the consideration and inducement had substantially failed. But, allowing the lease to stand, the parties would be left to make an equitable adjustment in lieu of the contemplated streets; and I think all that could be required of the lessor would be, that he allow a reasonable ingress and egress to and from the demised premises to some convenient highway. The grantor would have been under no more legal obligation to keep open the contemplated streets than the grantee would be to level and pave the street. Both these covenants would be defeated by the failure of the contingency.

Now it appears, that by the act of the third of April, 1807, the corporation of New York were superseded in regard to their power over these streets, and three commissioners were

substituted, with more plenary authority. By the fourth section of that act, the commissioners have "exclusive power" over the subject; and it is enacted, that "no square or plot of ground, made by the intersection of any streets to be laid out by the said commissioners, shall ever, after the streets around the same shall be opened, be or remain divided by any public or open lane, alley, street, or thoroughfare." By the map annexed to the case, it will be seen, that in 1811, the commissioners, disregarding the plan contemplated by these parties, laid out and established avenues and streets over the lands of Petersfield, in a manner entirely different, and inconsistent with the streets originally proposed by Mr. Stuyvesant. No authority short of the legislature can now alter or defeat the plan established by the commissioners; and permanence is strongly inscribed on what they have done. Indeed the plan of the commissioners is, in a measure, already executed over these grounds, by the opening of the third avenue.

It seems to me, therefore, that the defendant, in 1815, not only had a right to fence up Peter street as he did, but that it was his duty to conform to the new regulation imposed by the government. The streets must not only be opened according to the new plan of the commissioners, but the law is express, that no public street, lane, alley or thoroughfare, shall be permitted to intersect the squares or plots formed by the intersection of the streets laid out by the commissioners. Peter street does intersect several of the squares laid out by the commissioners. It is true, that the streets and avenues, so established by the commissioners, are not to be opened, until the corporation of New York shall direct; but we know they are proceeding very rapidly in those improvements; and it seems to me that it would be vexatious and unjust to compel the defendant to keep open the streets as originally contemplated by his ancestor, since it is ascertained that his plan is defeated, and cannot be carried into effect.

The defendant has left a reasonable and convenient outlet, or private way, from the leased premises to the Bowery road, which, in my judgment, is all that can be lawfully required of him, under the circumstances of this case.

We are therefore, of opinion, that a new trial ought to be granted, with costs to abide the event.

New trial granted.

In *People v. Jones*, 6 Mich. 184, Campbell, J., says: "The case of *Underwood v. Stryssens*, lays down this doctrine in regard to city streets in very strong terms. And in all the cases which have arisen in New York, upon town or city ways, this principle has been adhered to. It would certainly lead to strange consequences if the plan of a city could be placed beyond the reach of its corporate authorities, and varied without their assent."

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## BUTLER v. KENT.

[19 JOHNSON, 222.]

**DAMAGES FOR BREACH OF PUBLIC DUTY.**—An individual cannot maintain an action against an officer or other person for damages arising from a breach of duty to the public, without showing some special and peculiar injury to himself.

**PEARING SPECIAL DAMAGES.**—In cases of tort the special damages sued for must be the legal and necessary consequence of the alleged wrongful act and must be particularly stated.

**ACTION AGAINST MANAGERS OF LOTTERY.**—One who has purchased tickets in a lottery to sell again cannot maintain an action against the managers of such lottery for their careless, negligent and improper conduct of the same, whereby public confidence in the lottery was impaired, so that a large number of the plaintiff's tickets remained unsold and drew blanks.

**ACTION** against the managers of "The Fifth Class of the Medical Science Lottery." The declaration alleged in substance that the defendants having been duly appointed managers of the said lottery, it became their duty to take an oath faithfully to perform their trust, and then to superintend in person the preparation, conduct and drawing of said lottery; that the plaintiff being a dealer in lottery-tickets, and having full confidence in the defendants' faithful, honest and careful conduct and management of the said lottery, purchased a large number of tickets therein for the purpose of selling the same at a profit; that if the defendants had well and faithfully conducted said lottery, the plaintiff would have realized large gains from sales of tickets; yet that the defendants, not ignorant of the premises, but unmindful of their duty, did not take the oath required, nor superintend the drawing of the said lottery, nor prepare, or cause to be prepared, the numbers and blanks, and put the same in the wheels, or cause the same to be drawn fairly and in succession, one by one; but wholly and grossly neglected their duty, and permitted one Seckels, who was not duly appointed or sworn as a manager, to act as such, and to superintend the drawing, and that the defendants conducted the drawing in such a careless, negligent, unfaithful and fraudulent manner, that

whole handfuls of tickets were taken out of the wheel at one time, some of which were dropped on the floor, and that the numbers were not, and from these circumstances, could not be, called in the order in which they were drawn, etc., "whereby the public confidence in the integrity and fairness of the drawing of the said lottery was wholly lost, and the demand for tickets in the same by purchasers, and the price of such tickets by retail, were greatly diminished, insomuch that the plaintiff could not sell his tickets by retail, so that the same remained on his hands, and were drawn by him as blanks, so that he lost the moneys which he paid for the same, and the profits, which ought to have been derived from the sale of them, to the damage of the plaintiff twenty thousand dollars." There was a general demurrer to the declaration and joinder therein.

*Slosson*, for the demurrer.

*Fay*, *contra*.

By Court, SPENCER, C. J. Although the declaration states many particulars of mismanagement, either by the defendants or their agents, it nowhere charges them with fraud. The amount of the *gravamen* is that they were negligent in conducting the preparation for and the drawing of the lottery; that the plaintiff had bought tickets in the lottery for the purpose of selling, and that in consequence of the negligent manner in which the drawing and managing the lottery was conducted, public confidence in the integrity and fairness of the drawing of the lottery was lost, the demand for tickets and the price of the tickets was diminished, so that the plaintiff was unable to sell his tickets; and they remained unsold, and were drawn blanks. The declaration, it is true, states that the defendants conducted the drawing of the lottery in such a careless, negligent, unfaithful, and fraudulent manner, that whole handfuls of tickets were permitted to be taken out of the number wheels at a time, etc. This does not amount to a charge of direct and personal fraud, but merely to carelessness and negligence; and it is averred that this carelessness and negligence led only to calling the numbers out of their order, and not as they were drawn from the wheel. The present action is founded on the misbehavior of the defendants in a public trust, whereby a private injury to the plaintiff is supposed to have been committed. It is an action of the first impression, and must be governed by known and established principles.

I consider the point beyond all dispute, that for a misbe-



havior of an officer in his office, either from misfeasance or non-feasance, no one can maintain an action against him, unless he can show a special and particular damage to himself. Without such special and particular damage, he has no title to call the officer to account. Lord Coke, Co. Lit. 56, a, says, in a case which bears strong analogy to this: "That if a way be a common way, if any man be disturbed to go that way, or if a ditch be made overthwart the way so as he cannot go, yet shall he not have an action upon his case; and thus the law provided for avoiding of multiplicity of suits; for if any one man might have an action, all men might have the like." He proceeds to say that if he had his horse fall into the ditch, whereby he received hurt and loss, there, for his special damage, which is not common to others, he shall have an action upon his case. This principle was solemnly recognized and acted upon in *Pain v. Patrick*, 3 Mod. 289. The same case is reported in 1 Salk. 12, as *Payne v. Partridge*. In *Ivason v. Moore*, 1 Salk. 16; 1 Ld. Raym. 486, which was an action on the case for stopping up a highway leading to the plaintiff's colliery with intent to deprive him of the profit thereof, *per quod*, he lost the profit, etc., and his coals were spoiled for want of buyers. C. J. Holt and Rokesby (*contra* Tourton & Gould) were of opinion that no action lay, the way appearing to be a public highway. They held that the plaintiff had no better right than anybody else, and that a man could not have a particular action without a particular injury, or a particular right, which, they said, were the grounds upon which all actions are founded, and to which they must conform. The same principles were adopted in *William's case*, 5 Co. 73. Baron Comyns cites the cases in Salkeld as law: 1 Com. Dig. 180, Action upon the case, B. 2. The same principle was adopted by Lord Kenyon in *Herbert v. Groves*, 1 Esp. 148, which was afterwards confirmed by the court.

The analogy between the cases cited and the present consists in this, that the defendants have undertaken a duty which is common, in regard to all those who purchase tickets in that lottery; that they owe no peculiar duty, and are under no particular obligation to the plaintiff, as to their conduct, other than such as is common to all the purchasers and holders of tickets in that lottery. The defendants, then, stand in the same relation to the plaintiff as they do to a great number of other persons. So, in the case of a public road, all who choose to travel it have an equal right; digging a ditch across the road is an injury alike to all, but no one can maintain an action unless

he can show a particular injury, an injury peculiar to himself; not merely that he could not pass the road, but that some special damage happened to him.

The particular injury stated by the plaintiff is, that by the defendant's conduct and negligence, in the instances pointed out, the public confidence in the integrity and fairness of the drawing of the lottery was wholly lost, and the demand for tickets by purchasers, and the price of the tickets were greatly diminished, so that the plaintiff could not sell his tickets, by retail, and the same were drawn as blanks. I perceive in these allegations no charge of any particular injury to the plaintiff; nor do I perceive any particular right of the plaintiff which has been violated. The injury, if any, is common to all those who held tickets in that particular lottery; and we see that in such a case it appertains to the public only to avenge the injury. If there has been any unfaithfulness or dishonesty on the part of the managers of this lottery they are responsible, under the bonds which the statute, 1 R. L. 270, requires them to give; and possibly, also, by indictment.

There is another view of the subject, which, I apprehend, equally concludes against the plaintiff. In cases of torts it is necessary to show that the particular damage in respect of which the plaintiff proceeds, must be the legal and natural consequence of the wrongful acts imputed to the defendant: 1 Chit. Pl. 388; 8 East, 8. It is another rule that the special damage must be particularized, in order that the defendant may be able to meet the charge, if it be false; if it be not so stated, it cannot be given in evidence. And if the action be not sustainable, independent of the special damage, the declaration is bad on demurrer: 1 Chit. Pl. 389; 1 Saund. 243, n. 5; 8 T. R. 132. A declaration by a victualler, for calling his wife a whore, whereby several customers left his house, is too general. So, a declaration for slander of title to an estate, whereby the plaintiff lost the sale of it, is sufficient: 1 Chit. Pl. 389. The same doctrine is held in *Mason v. Moore*, 1 Salk. 16. The only allegation of special damage is, that in consequence of the loss of public confidence in the integrity and fairness of the drawing of the lottery the plaintiff could not sell his tickets by retail. In the case last cited, Lord Holt was of opinion that it was not enough to say that the plaintiff lost customers, or that buyers would not come, without showing that buyers were coming and were hindered. It is impossible to conceive anything more vague and untriable than the loss of a market for any commodity from the want of public confidence.

The cases cited by the plaintiff's counsel are inapplicable. The case of *Ashby v. White*, 2 Ld. Raym. 938, came under the consideration of this court in *Jenkins v. Waldron*, 11 Johns. 120 [6 Am. Dec. 359], and we held that to enable a voter whose vote was refused to maintain an action, the refusal to admit the vote must appear to be fraudulent and malicious; but there is no analogy between the cases. The injury, if any, is peculiar to the party whose vote is rejected; the right to vote is enjoyed by many; but the injury is not of a common nature. The case of a postmaster, through whose negligence a letter or anything transmitted by the post is lost, is different, and is distinguishable from this case; for the injury is a particular one to the party who suffers the loss.

Upon the whole, we are clearly of opinion that the present action is not maintainable, and that the defendant must have judgment.

Judgment for the defendants.

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The principle here laid down regarding damages, that the damages must be the natural and direct consequence of an injury, is followed with approval in *Addington v. Allen*, 11 Wend. 412; *Clark v. Brown*, 18 Id. 229; *Kendall v. Stone*, 5 N. Y. 20; *Fort Plain Co. v. Smith*, 30 Id. 62; *Woodman v. Nottingham*, 49 N. H. 387; *Craig v. Burnett*, 32 Ala. 728.

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## HULL v. SUPERVISORS.

[19 JOURNAL, 288.]

**MANDAMUS TO CONTROL DISCRETION.**—*Mandamus* lies, when there is no other legal remedy, to compel an inferior tribunal to obey the law by exercising a discretion confided to it, but not to control such discretion. Hence, where the supervisors of a county refuse to allow a claim which is a legal charge against the county, they may be compelled by *mandamus* to admit and act upon such claim as such charge, but not to allow any particular sum thereon.

**APPLICATION** for a *mandamus* to compel the supervisors of Oneida county to admit and allow a certain claim of the petitioner against the county. A rule having been granted requiring the supervisors to show cause why the *mandamus* should not issue as prayed, the supervisors accordingly appeared, and showed that they had already acted upon the claim and had allowed five dollars thereon, and they insisted that the court had no jurisdiction to compel them to change or review their decision.

The facts are stated in the opinion.

*T. E. Clark*, for the petitioner.

*Storrs, contra.*

By Court, PLATT, J. From the affidavits of Amos G. Hull, Isaac Miller, and Seth Hastings, it appears that one Patrick Crosby was a transient sick pauper in the town of Paris, not having any legal settlement in this state. A regular order by a justice was made, on the application of an overseer of the poor, for a weekly allowance to support the pauper, he being incapable of removal. While in this situation, there was a sudden necessity for a surgical operation to save the life of the pauper, and without any special application of the overseers, and without any order from a justice for that purpose, the surgeon, A. G. Hull, went ten miles and performed the operation. For this service he charged thirty dollars, and presented his account to the board of supervisors, as a charge against the county, at their various meetings in 1818, 1819 and 1820. By the affidavit of Jesse Curtis, one of the supervisors, it appears "that the reasons why the account of thirty dollars was not allowed, were, that it was deemed by the board, that the said account ought to have been presented, for adjustment and payment, to the overseers of the poor of the town of Paris; that the account when presented, was not accompanied by any certificate of the overseers of the poor; that he, Doctor Hull, was never employed to perform the said services, or that the account had been allowed by them; nor that any justice's order for medical aid had ever been made." And "that the sum of five dollars was at last ordered to be paid to the said Hull, not as a claim which was deemed strictly allowable, but to stop the claim, and rid the board of the trouble thereof; and that the board considered the said sum of five dollars, under all the circumstances, as much as ought to be paid."

The superintending control over inferior courts, magistrates, corporations, etc., by *mandamus*, is in *subsidium justitiæ*. In the case of *The King v. Archbishop of Canterbury etc.*, 15 East, 117, Lord Ellenborough said: "This court, in the exercise of this authority, to grant the writ of *mandamus*, will render it, as far as it can, the suppletory means of substantial justice, in every case where there is no other specific legal remedy for a legal right."

In the case of *The King v. The Justices of Kent*, 14 East, 395, Lord Ellenborough said: "If the justices had rejected the application, in the exercise of the discretion vested in them by

the legislature, the court would not interfere; but if they had rejected it on the ground now stated, that they had no power to grant it, the court would interfere so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application." In that case the statute declared that the justices shall have authority to limit and appoint the rate of wages of such laborers, artificers, etc., as they shall think meet, by their discretion, to be rated," etc. The justices refused to act, upon the ground that they had no jurisdiction to interfere in that particular case; and a peremptory *mandamus* was granted, not as the judges explained, to control the discretion of the magistrates, but to guide and instruct them in their duty, so far as to determine that they had authority by law to settle a rate of wages in the case before them.

In perfect accordance with these cases and all the other authorities cited by the counsel for the supervisors, we granted the rule to show cause in this case. The distinction recognized by us is, that where the inferior tribunal has a discretion, and proceeds to exercise it, we have no jurisdiction to control that discretion by *mandamus*. But if the subordinate public agents refuse to act, or to entertain the question for their discretion, in cases where the law enjoins upon them to do the act required, it is our office to enforce obedience to the law by *mandamus*, in cases where no other legal remedy exists. The case of *The People v. Supervisors of Albany*, 12 Johns. 414, and the *Matter of Bright v. Supervisors of Chenango*, 18 Id. 242, exemplify this distinction.

From the facts disclosed by the affidavits in this case, the question before the board of supervisors was not whether the applicant claimed more than a reasonable compensation for his services, but whether the account was legally chargeable against the county? At two successive boards, the claim was rejected on the ground that it was not a county charge. Curtis, one of the supervisors, swears, that on the third application, the account for thirty dollars was rejected, as not being a legal claim against the county; but "that the sum of five dollars, was, at last, ordered to be paid to the said Hull, not as a claim which was deemed strictly allowable, but to stop the claim and to rid the board of the trouble therefor; and that the board considered the sum of five dollars, under all the circumstances as much as ought to be paid." By this I understand that the supervisors denied that he had any legal claim which they were bound to audit and allow, but in order to get rid of his importunity, they offered to give him five dollars.

Now this shows clearly that the supervisors did not entertain the question whether thirty dollars or any other sum, was a reasonable allowance for the services rendered. That would have been a matter for their discretion, over which we exercise no control. The supervisors acted upon the principle that the applicant had no legal claim, and the order to pay him five dollars, according to their own showing, was an unwarrantable act. They had no right to make such a gratuity. And, on the other hand, Dr. Hull had a perfect right to reject the compromise, and to insist upon having his account audited and allowed as a county charge; and in order to test and decide his legal right, the rule to show cause was granted.

The question now presented is, whether the supervisors were bound to audit and allow the account as a county charge? If it be a legal claim, then we have no doubt of our jurisdiction to instruct and guide the supervisors in the execution of their duty by *mandamus*, not to control discretion in judging what is a reasonable compensation for such services; but to compel them to audit the claim as a county charge, and to exercise their discretion as to the amount; or, in the language of Lord Ellenborough, in the case before cited, "this court would interfere so far as to set the inferior court in motion."

On examining the provisions of the "act for the relief and settlement of the poor," and particularly the twenty-fifth section of that act, we are of opinion that the previous order of the justice, for occasional allowance for the sustenance of the transient pauper, was not in itself a sufficient authority to warrant the allowance of this claim as a county charge. The extraordinary expense of such a surgical operation (although proper and necessary in this case,) cannot legally be imposed on the public, without an express previous order of the justice, on the application of the overseers, or, at least, a subsequent ratification and sanction by the justice and overseers. Here was no such previous order, nor any subsequent adoption of the claim. We are, therefore, constrained to say, that in rendering the service, the relator must be deemed to have acted gratuitously, or to have relied upon individual responsibility for his reward.

The motion for a *mandamus* is therefore denied, but without costs.

Motion denied.

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The rule here established as to the propriety of granting a *mandamus* is approved in a recent Illinois case: *People v. Supervisors*, 84 Ill. 303; see *State v. Bruce*, 6 Am. Dec. 577; *Commonwealth v. Rosseter*, 4 Id. 451.

## CHAPMAN v. MURCH.

[19 JOHNSON, 280.]

**EXPRESS WARRANTY, WHAT CONSTITUTES.**—Formal words of warranty are not necessary to constitute an express warranty of soundness of a chattel; any direct and express affirmation of its quality or condition, showing an intention to warrant, will be sufficient.

**ERROR** to the common pleas to reverse a judgment rendered for the defendant, in an action of *assumpsit* upon a warranty of soundness in the sale of a horse. The declaration averred that the plaintiff exchanged horses with the defendant, and that the defendant undertook and promised that his horse was sound, whereas he was, in fact, unsound, having a certain disease called "yellow water," of which he died soon after. Plea, the general issue. To prove the warranty the plaintiff offered a witness to show, that at the time of the exchange of horses the defendant represented his horse to be sound. The defendant objecting, the court excluded the evidence, on the ground that the plaintiff was bound in this action to prove an express warranty, and that this evidence was not sufficient for that purpose. To this opinion the plaintiff excepted, and after judgment brought the case here by writ of error; and it was submitted to the court without argument.

By Court, SPENCER, C. J. In the various cases which have been cited, it appears abundantly that when the action is founded on a warranty of the soundness of a chattel sold, a warranty must be proved; but it nowhere appears that it is necessary that the vendor should use the express words that he warranted the soundness. If a man should say, on the sale of a horse, "I promise you the horse is sound," it is difficult to conceive that this is not a warranty, and an express one too. Peake on Evid. 228, says: "In an action on a warranty, the plaintiff must prove the sale and warranty." "In general (he says) any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount to a warranty." He adds, "but where the defendant refers to any document, or to his belief only, in such cases no action is maintainable without proof that he knew that he was representing a falsehood." In every action on a warranty it must be shown that there was an express and direct affirmation of the quality and condition of the thing sold, as contradistinguished from opinion, etc., and when that is made out, it would be an anomaly to require that the word warrant should be used. Any

words of equivalent import showing the intention of the parties that there should be a warranty will suffice. In the present case, the plaintiff offered to prove what, under the circumstances, might be an express warranty; and that was for the consideration of the jury, under the advice of the court: 2 Cai. 56; 3 T. R. 57; 10 Johns. 481.

The judgment must be reversed, and a *venire facias de novo* awarded to the court below.

Judgment reversed.

See this subject discussed in note to *Emerson v. Brigham*, 6 Am. Dec. 109.

## SWARTWOUT v. PAYNE.

[19 JOHNSON, 294.]

**USURIOUS RENEWAL OF NOTE.**—Where, upon the renewal of a note, a premium above seven per cent. is exacted, the new note is usurious, although a separate note is given for the premium.

**IDEM—ANTECEDENT DEBT VALID.**—A usurious note given in renewal of a former valid one does not affect the antecedent debt.

**TRANSFER OF USURIOUS NOTE.**—Where the holder of a note, knowing it to be usurious, transfers it to another as part of the consideration for a purchase of land, with the assurance that it is good and valid, the transferee, upon failing to recover on the note on account of the usury, may treat it as a nullity, and bring *assumpsit* against the purchaser of the land for the consideration.

**ASSUMPSIT.** The declaration contained four counts: 1. For the price of certain land sold to the defendant; 2. *Quantum valebat* for the same; 3. For money lent, money paid, and money had and received; 4. On an account stated. Plea, *non-assumpsit*. It appeared in evidence that the plaintiff sold and conveyed to the defendant a certain tract of land; that in part payment, the defendant transferred to the plaintiff a certain note for four hundred dollars made by one T. Goodman, Jr., payable to N. Visscher, and indorsed by the latter and by T. Goodman, Sr., the defendant assuring the plaintiff at the time of the transfer, that the note was as good as the bank, and that on leaving it at the bank he would get the money when it was due. The plaintiff further proved, against the objection of the defendant, by the record of a judgment obtained against him by Visscher, the indorser on said note, that he had sued Visscher on the note, and had been nonsuited on the ground of usury. He also proved by one Stark, the substance of whose testimony is stated in the opinion, certain facts going to show



that the note was usurious. The jury, under the direction of the judge, returned a verdict for four hundred dollars in favor of the plaintiff, subject to the opinion of the court.

*Foot*, for the plaintiff.

*Huntington*, *contra*.

By Court, SPENCER, C. J. It appears very clearly that the plaintiff received from the defendant a note for four hundred dollars, drawn by Titus Goodman, jun., payable to N. I. Visscher, and indorsed by Visscher and Titus Goodman, in payment for lands sold and conveyed by the plaintiff and wife, to the defendant. The note was received as part of the consideration-money, on the strong assurances of the defendant that it was as good as the bank, and that all he would have to do would be to leave the note at the bank and receive the money. If it shall appear that the note was void for usury, and that the defendant knew it to be so, there can be no doubt of the plaintiff's right to recover.

I do not consider it as very material whether we regard as evidence the proceedings in the suit brought on this note against Visscher. Had the defendant been notified of that suit, and required to attend the trial, and furnish evidence to enable the plaintiff to recover, I should have considered that trial as conclusive upon his rights: 1 Johns. 517; 6 Id. 158; 7 Id. 168; Phil. Ev. 227; but the defendant had no notice of the suit, and cannot be concluded by it. The single question, then is, whether the note was proved to be usurious on this trial.

It appeared by the evidence of H. Stark that the defendant received this note, which he passed to the plaintiff, in renewal of a former note, in all respects similar to this, except the date, and that on giving up the first note, and taking the note in question, the defendant exacted and took from T. Goodman, jun., an additional note, for a premium for renewing the first note, the precise amount of which the witness did not know, but he thought it to be fifteen dollars; and that the defendant, after the renewal, told the witness that the note he took for the premium was for more than fifteen dollars. The witness saw the old note given up, and the new note taken, and the premium note delivered. An ineffectual attempt was made to impeach the testimony of Stark, but it was wholly unavailing.

The first note is not shown to be usurious, and we must, therefore, consider that as a *bona fide* security, and a *bona fide* debt due from the parties on it to the defendant. The amount

of the argument on the part of the defendant is, that the subsequent usury in taking the new note did not affect or destroy the antecedent debt, which was free from usury. This is undoubtedly true, and *Gray v. Fowler*, 1 H. Bl. 462, and 1 Saund. 295, a., and the authorities there cited, fully maintain the position. But it is equally certain that if in receiving the new security a rate of interest above seven per cent. was received for forbearance, the new securities are void by the statute; and in this view it is immaterial whether the illegal interest was reserved, and made payable by a distinct note, or was incorporated into one note. They are considered as one assurance, and are all void, into whose hands soever they may come: 1 Saund. 295, a.

The note being a nullity, according to the case of *Markle v. Hatfield*, 2 Johns. 455 [8 Am. Dec. 446], the plaintiff had a right to sue on the original contract.

Judgment for the plaintiff.

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Showing that where a usurious note or other security is declared void, the debt for which it was given still subsists, this case is relied on in *Farmers' etc. Bank v. Joslyn*, 37 N. Y. 355.

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## LEE v. WOOLSEY.

[19 JOHNSON, 312.]

**PROVOCATION FOR ASSAULT.**—In an action for assault and battery, provocation cannot be given in evidence in mitigation of damages, unless it was so recent and immediate as to induce the presumption that the violence was committed under its influence; hence, acts and declarations of the plaintiff at a different time, and antecedent facts not forming part of the same transaction, are not admissible.

**ACTION OF TRESPASS AND ASSAULT AND BATTERY.** It appeared that in July, 1820, the defendant, a post captain in the navy, met the plaintiff, who was an attorney at law, and said to him: "Did you write that scandalous and infamous letter for Conder, against me to the secretary of the navy?" The plaintiff replied: "I did, but I did it as an attorney, and was paid for it." The defendant then said, "What insinuations did you throw out yesterday, against me, when my team was passing with timber through the village?" The plaintiff said, "Not any." The defendant replied, "You lie, you scoundrel, you infamous puppy," and immediately drew a raw-hide whip and beat the plaintiff severely, inflicting great bodily injury. In mitigation of damages the defendant offered in evidence a certain anony-

mous paper addressed to the secretary of the navy, reflecting upon the defendant, which he proposed to prove was in the plaintiff's handwriting, and had been published and circulated in the neighborhood where the parties resided, and had come to the defendant's hands a few days before the assault. He also offered to prove that on the day before the assault the plaintiff had made several scandalous insinuations against the defendant, charging him with embezzlement of public property etc., and that these charges came to the defendant's ears the evening before the assault. The evidence being objected to was rejected. The defendant then offered to prove that the paper produced by him was the one referred to in the conversation at the time of the assault, and also that the plaintiff's denial at that time that he made any insinuations against the plaintiff on the day before, was untrue. But this evidence was also objected to and rejected by the judge. The plaintiff had a verdict for five hundred dollars damages, and the defendant moved for a new trial.

*Storrs*, for the defendant.

*Kirkland*, *contra*.

By Court, SPENCER, C. J. The evidence offered and overruled, could neither be admitted in mitigation of damages, nor as explanatory of the transaction. The only view in which the evidence could be admissible, would be for the purpose of showing, that the defendant, under the influence of excited and irritated passions, was impelled, by a sense of the injury done to him by the plaintiff, thus to redress himself. The law, in tenderness to human frailties distinguishes between an act done deliberately, and an act proceeding from sudden heat.

If upon a sudden quarrel, two persons fight, and the one kills the other, this is manslaughter only. So, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable, the offense is a mitigated homicide, for there is no previous malice. But in every case of homicide upon provocation, if there be sufficient time, intervening the affront and the killing, for passion to subside, and reason to interpose, the offense becomes murder. In analogy to this principle, evidence in civil actions for assaults and batteries, in mitigation of damages has been admitted to show a provocation on the part of the party complaining of the injury. But the provocation must be so recent, as to induce a fair presumption, that the violence done

was committed during the continuance of the feelings and passions excited by it. On any other principle the law would countenance the most revengeful feelings, and indirectly; also, an appeal, by persons conceiving themselves injured, to force and violence. The case of *Avery v. Ray*, 1 Mass. 12, was decided on these principles. All the judges were opposed to the admission of evidence of a remote provocation, and confined the inquiry to an immediate antecedent one. If the defendant had been permitted to show what he offered in mitigation of damages, it would follow that the plaintiff ought to have been allowed to show the truth of the statement contained in the letter to the secretary of the navy, and so, also, of the other charge, and thus an inquiry wholly different from the one on the record, would be gone into, diverting and distracting the attention of the jury. It appears to me, neither to comport with sound policy nor law to allow an inquiry into antecedent facts, in such a case as this, unless they are fairly to be considered, as part of one and the same transaction. A contrary course would greatly encourage breaches of the peace, personal re-encounters, and every species of brutal force, and would tend to uncivilize the community.

The case of *Hotchkiss v. Lothrop*, 1 Johns. 286, to which the defendant's counsel referred, has no bearing on this question. The libel published by the plaintiff, was admitted in evidence as explanatory of the subject-matter of the defendant's libel, and to show the occasion and intent of the publication.

Motion denied.

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## HARTWELL v. ROOT.

[19 JOHNSON, 345.]

**PRESUMPTION OF PERFORMANCE OF DUTY.**—The presumption is that official duty has been regularly performed, until the contrary appears. Hence, where a deputy sheriff had an execution against a party, returnable in February, and in March following, the debtor sold a pair of horses which he had in his possession at the delivery, and on the return day of the execution, and the deputy sheriff afterwards took and sold the horses under the execution, it was held in an action of trespass against him, that it would be presumed, in the absence of proof to the contrary, that he had lawfully levied upon the property before the return day.

**ERROR** to the common pleas to reverse a judgment obtained by Root in an action of trespass brought by him against Hartwell, for taking and carrying away a pair of horses belonging to the plaintiff, in which action the defendant pleaded "not

guilty." The plaintiff proved that he purchased the horses in March, 1819, of one David Conkling, and that they were taken and sold by the defendant in May, 1819. The defendant proved that he took the horses as deputy sheriff under a writ of *fi. fa.*, against Conkling, tested the seventeenth of November, 1818, and returnable the third Tuesday in February, 1819, which was delivered to the defendant December 7, 1818. It was proved also, that Conkling had the horses in his possession when the execution was issued, and until the return day thereof. The property was sold by the defendant at sheriff's sale to one Lane. There was evidence that the plaintiff had sued Lane in trover, but had dismissed the action, and given Lane a release upon the payment of costs and counsel fees by the latter. There was no proof of an actual levy in the life-time of the execution against Conkling, but the defendant insisted, that under the circumstances it would be presumed. The court, however, thought otherwise, and so instructed the jury, who returned a verdict for the plaintiff; whereupon the defendant brought the case here upon exceptions to the ruling of the court below.

*J. C. Spencer*, for the plaintiff in error.

*Kirkland, contra.*

By Court, WOODWORTH, J. The question in this cause is, whether it is not to be presumed that the defendant made a levy on the property of Conkling?

The court below decided that the matters given in evidence were not sufficient to bar the plaintiff's action. The officer acted under his oath of office. His duty required him to make a levy; and it does not appear that Conkling had any other property besides the horses to satisfy the execution. In such a case, in the absence of positive proof, and against a public officer, the circumstances offered a fair and reasonable presumption that a levy had been legally made.

The general rule is, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it, unless the contrary be shown: 3 East, 192; 10 Id. 216; Phil. Ev. 151. In an information against Lord Halifax, for refusing to deliver up the rolls of the exchequer, the prosecutor was required to prove the negative, that he did not deliver them up: Peake's Ev. 5; Bull. N. P. 298; 3 East, 192; 3 Wils. 362; 2 Bl. Rep. 852. In *Jackson v. Shafer*, 11 Johns. 517, the sheriff sold land and executed a deed. The defendant

contended that the sale was void, because it was not shown that there was a previous levy. The court said "it nowhere appears there has not been a levy, and if it were necessary they would, under the circumstances of the case, presume it to have been done."

The case of *Bliss v. Ball*, 9 Johns. 132, relied on by the defendant in error, is not analogous. In that case the execution had lain a year in the sheriff's hands; the property was sold by the defendant, in execution, to a *bona fide* purchaser. The sheriff delayed in selling on the execution, because he was instructed that a compromise was pending. After the year, however, he proceeded to sell; and it was held, that an execution lying dormant for a year, and without evidence of an actual levy, was sufficient for third persons to presume it satisfied, unless knowledge of an actual seizure was brought home to the purchaser. The fact that the execution was dormant was sufficient for the *bona fide* purchaser.

This case does not depend on the general right of the sheriff to retake the goods of the debtor, removed after he receives the execution and before the return day. Here Conkling had possession until after the return day; and notification even to his wife of a levy would have been sufficient: 17 Johns. 116, 128. A sheriff is not bound, at his peril, to have proof of a levy in a case like this, when the person who must be presumed to have done his duty is sued and cannot be heard as a witness.

Judgment reversed.

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## GUILLE v. SWAN.

[19 JOHNSON, 381.]

**TRESPASS WITHOUT INTENTION.**—Where an injury is the immediate consequence of an act, whether it was intentional or unintentional, the doer of the act is liable in trespass.

**JOINT TRESPASS.**—If several persons co-operate in the performance of an act which occasions an injury, they are liable as trespassers, either jointly or severally, and one may be held responsible for all the damages if it appear that they acted in concert, or that the acts of the others were the natural result of the act performed by the one sued.

**CONSEQUENTIAL INJURY—DAMAGES.**—Where the defendant went up in a balloon, and descending in the plaintiff's garden became entangled and called for help, whereupon a crowd broke into the garden and injured the fences and plants, it was held that the injury was the natural and ordinary consequence of the act of the defendant, and that he was liable therefor.

**CERTIORARI** to the justice's court in the city of New York, in an action of trespass brought by Swan against Guille, for entering the plaintiff's garden, treading down his vegetables, etc. The facts were that the defendant ascended in a balloon near the plaintiff's garden, and came down in the garden. Becoming entangled, and being in a perilous situation, he called for help, and the crowd who were pursuing the balloon broke into the garden and extricated him from his position. The damages done to the garden and inclosure amounted to ninety dollars, of which the defendant with his balloon was held liable for the amount of fifteen dollars, and the rest was done by the crowd. The justice instructed the jury that the defendant was responsible for all the damages, and they accordingly returned a verdict for the plaintiff for ninety dollars, upon which judgment was entered.

The cause was submitted on the return to the *certiorari* with the briefs of counsel.

By Court, **SPENCER, C. J.** The counsel for the plaintiff in error supposes that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that therefore there was no union of intent; and that upon the same principle that would render Guille answerable for the acts of the crowd, in treading down and destroying the vegetables and flowers of S., he would be responsible for a battery, or a murder committed on the owner of the premises. The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong. It was so decided upon a review of all the cases, in *Percival v. Hickey*, 18 Johns. 257 [9 Am. Dec. 210]. Where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally, produced the acts of the others.

The case of *Scott v. Sheperd*, 2 Bl. Rep. 892, is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Sheperd threw a lighted squib, composed of gunpowder, into a market house, where a large concourse of people were assem-

bled; it fell on the standing of Y., and to prevent injury, it was thrown from his standing, across the market, when it fell on another standing; from thence, to save the goods of the owner, it was thrown to another part of the market house, and in so throwing it, it struck the plaintiff in the face, and bursting, put out one of his eyes. It was decided by the opinions of three judges against one that Sheperd was answerable in an action of trespass, and assault and battery. De Grey, C. J., held that throwing the squib was an unlawful act, and that whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing was a continuation of the first force and first act. Any innocent person removing the danger from himself was justifiable; the blame lights upon the first thrower; the new direction and new force flow out of the first force. He laid it down as a principle, that every one who does an unlawful act is considered as the doer of all that follows. A person breaking a horse in Lincoln's-Inn-Fields hurt a man, and it was held that trespass would lie. In *Leame v. Bray*, 3 East, 595, Lord Ellenborough said, if I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue, I am answerable in trespass; and if one (he says) put an animal or carriage in motion, which causes an immediate danger to another, he is the actor, the *causa causans*.

I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation—all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled perhaps by the double motive of rendering aid and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the inclosure? I think not. In that case they would have been co-trespassers, and we must consider the situation in



which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly liable for all the injury sustained.

Judgment affirmed.

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This is a "land-mark" case in the law regarding trespass, and damages for a consequential injury; and with the "squib-case," *Scott v. Shepherd*, one of Smith's Leading Cases, is frequently cited in this connection. The rule is now established, on the authority of these cases, that a person is liable for consequential damages, when these are the necessary and probable results from an injury which he must have foreseen. Late adjudications rely upon the principal case for this rule: *Putnam v. Broadway R. R.*, 55 N. Y. 108; 8 C., 14 Am. Rep. 190; *Fraser v. Freeman*, 43 N. Y. 560; *Cate v. Cate*, 50 N. H. 154; 8 C., 9 Am. Rep. 181; *Richer v. Freeman*, 50 N. H. 420.

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## JACKSON v. LE GRANGE.

[19 JOHNSON, 386.]

**PROOF OF WILL.**—A will may be proved by one of the subscribing witnesses if he can testify that all the solemnities required by statute were observed; if not, the other witnesses must be produced, if living and within the jurisdiction of the court; and if dead, their handwriting and that of the testator must be proved, and then it is a question of fact, under all the circumstances, whether the statutory requisites were complied with. Accordingly, where only one of the subscribing witnesses was called, who testified to his own signature and the handwriting of another witness who was dead, but could not recollect any of the facts, and did not remember the testator, and it appeared that the other subscribing witness was living and within the jurisdiction of the court, it was held that the proof was not sufficient.

**EXECUTMENT** for a tract of land claimed by the plaintiff under the will of Amie Le Grange, dated January 28, 1796. To prove the execution of the will the plaintiff called John N. Quackenbush, one of the subscribing witnesses, who testified to his signature and to the handwriting of Lansing, another of the witnesses, who was dead, but stated that he had no recollection of ever having seen the testator, or of the execution of the will, though he supposed, from the fact that his name was subscribed to it as a witness, he must have seen it executed, and that at the time when it purported to have been executed he was twenty-one years old, and knew what was requisite to the good execution of a will. Wendell, the other subscribing witness, was living within the state, but was not called. The will

had never been admitted to probate, nor had letters of administration been taken out thereon. The chief justice permitted the will to be read in evidence, against the objection of the defendant, who insisted that it was not duly proved, and the question was reserved for the whole court.

*Butler*, for the defendant.

*S. Beardsley, contra.*

By Court, SPENCER, C. J. I am of opinion that the will was not well proved. Quackenbush merely proved his own signature, as a witness to the execution of the will. He had lost all recollection of the facts and circumstances attending its execution. He never knew the testator, nor had he, to his recollection, seen him before that time. I consider it well settled, that on a trial at law, where the execution of a will comes in question, the party supporting or claiming under it is not under the necessity of calling more than one of the subscribing witnesses, if he can prove the execution, as that the testator signed it in the presence of the witnesses, or acknowledged his signing to them, or to each of them, and that the witnesses subscribed it in his presence. But if the witness cannot prove these requisites, the other witnesses ought to be called. If they are dead, their handwriting, and the handwriting of the testator, ought to be proved; and then it becomes a question of fact, whether under all the circumstances, it is to be presumed that all the requisitions of the statute have been observed: *Phil Ev.* 383, 384; *Adams on Eject.* 267.

The death and signature of Jeremiah Lansing were proved, but it appeared the Matthew Wendell, the other subscribing witness, was alive and within the jurisdiction of the court. He ought to have been called, inasmuch as Quackenbush did not prove the facts essentially necessary to the valid execution of the will. If Wendell had been called he might have either proved or disproved those facts. If his recollection should, also, have failed him, still, if he could have proved his signature, then, on proving the signature of the testator, I should be of the opinion that the will had been sufficiently proved to entitle it to be read. The law does not require impossibilities; and, therefore, where the will has been executed for a long period before the trial, it is not, ordinarily, to be expected that the witnesses will be able to remember all the material facts. In this respect a will may be compared to a deed, the execution of which is denied. If the subscribing witnesses prove their

signatures, though they may not be able to recollect the delivery, yet, if they declared that they never subscribed, as witnesses, without a due execution of a deed by the grantor, or obligor, such proof would be sufficient. So, also, if the subscribing witnesses to a will are dead, the proof of their signatures, and that of the testator, is sufficient. *Prima facie*, the law will intend a due execution. The will, in this case, not being well proved, the plaintiff is entitled to judgment for one seventh part only of the premises.

Judgment accordingly.

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Chancellor Walworth, in *Jamney v. Thorne*, 2 Barb. Ch. 40, examines the subject of the proof of wills with much research. It is determined in this case that it is not indispensable that all the witnesses within the reach of process should be able to testify that every requirement of the law in force at the time the will was made, was duly complied with, and that the testator was of sound mind; and a will may be established in opposition to the testimony of all the witnesses upon this latter point. The presumption in favor of the due execution of the will, when it appears on its face to possess all the legal requisites, is such that it may prevail over the testimony of all the witnesses to the contrary, where so far corroborated by circumstances, or other testimony, that the court is satisfied such was the fact. The chancellor, reviewing the cases in England and in this country, examined the decision in the principal case, and showed it to be in conformity with the decisions in the ecclesiastical courts. He also made reference to *Pate v. Joe*, 3 J. J. Marsh, 113, *post*, as agreeing with the English cases.

In *Thornton v. Thornton*, 39 Vt. 122, this subject was considered, and the principal case relied on showing that in ejectment at law, where issue is made upon the validity of a will, the devisee is obliged to call but one of the attesting witnesses, if he can testify to a sufficient execution; but it is otherwise in ecclesiastical courts.

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## WOODWORTH v. BANK OF AMERICA.

[19 JOHNSON, 301.]

**PLACE OF PAYMENT OF NOTE.**—If no place of payment is specified in a note, payment must be demanded of the maker personally, or at his residence, in order to charge the indorser.

**ALTERATION OF PLACE OF PAYMENT.**—An alteration in the place of payment of a note by the maker, without the indorser's consent discharges the indorser. Accordingly, where the maker of a note, which was indorsed in blank for his accommodation, afterwards, without the indorser's knowledge, put a memorandum on the note, making it payable at a particular bank, and payment was demanded at the bank; it was held that this was a material alteration of the contract, and that the indorser was discharged.

**ERROR** to the supreme court in an action against the plaintiff in error, as indorser on a certain promissory note. The facts are stated in the opinion of the chancellor.

*Tuloot and Van Buren*, for the plaintiff in error.

*Hoffman and Henry*, for the defendants in error.

KENT, Chancellor. The facts in this case are few and simple. On the seventeenth of April, 1817, James Kane made a note, payable in sixty days, to order of John Woodworth, for two thousand five hundred dollars. The note was dated at Albany, where the maker then, and hath ever since resided. It was an accommodation note, being made and indorsed entirely for the benefit of the maker. It was indorsed in blank by Mr. Woodworth, without any explanation where it was going, but the note was intended by the maker as a renewal of another note, held by the Bank of America, and indorsed by the same indorser, who had not any knowledge that any of the former notes had made payable at or discounted at any bank in New York. After the note was so indorsed, it was returned to the maker, who then wrote a memorandum in the margin of it, in these words, "payable at the Bank of America," and subscribed his name to it, and this was done without the knowledge or assent of the indorser. The maker then procured another, or second indorser, and offered the note for discount at the Bank of America, where it was discounted for his use, in renewal of a former note.

When the note fell due, payment was demanded at the Bank of America, and refused, and notice thereof was regularly given to the indorser, by the first mail thereafter. The indorser being sued upon his indorsement, objected to pay, on the ground that there had not been a demand of payment of the maker, made either upon him personally, or at his place of residence in Albany, and that a demand at the place designated for payment by the memorandum of the maker in the margin of the note, was not sufficient. The case, upon that objection, appears to have been elaborately argued in the supreme court, and the chief justice delivered the unanimous opinion of that court (with the exceptions of the plaintiff in error, who did not sit in the cause), that the demand at the bank in New York was sufficient to charge the indorser.

The question now is, whether the demand at the place designated by the maker was sufficient; and this question is to be decided according to the usages and maxims of the law-merchant, which is a part of the law of the land. The chief justice, in the able and learned opinion which he read in his place in this court, observed, that when the note was indorsed by

the then defendant, it was not payable at any place; and that if the memorandum had not afterwards been made, and the residence of the maker had continued to be in Albany, and he had remained in Albany when the note fell due, the demand in order to charge the indorser, must have been made upon him, either personally, or at his place of business in Albany. But the chief justice also observed, that if the maker had changed his residence before the note fell due, or if he had been met with in New York, or elsewhere, when the note fell due, a personal demand upon him would have been regular and sufficient to fix the indorser, and that it could not then be said, that it was any part of the contract that demand should be made of the maker only in Albany, or that the note was indorsed under the belief of any such necessity. If the note be silent as to the place of payment, why, he asked, is it not competent to the maker to designate a place where payment should be made? It is a circumstance within his control, and under his direction, when no place of payment is mentioned in the note. If he had removed to New York or gone there on a visit, or expressly for the purpose of having a demand made upon him there, a personal demand upon him there would have been sufficient to charge the indorser. It was a matter of entire volition on the part of the maker, where the demand should be made, and he certainly could, in this case, do by agreement, whatever he could lawfully do by his locomotive powers. The defendant having indorsed the note without restraint upon the maker as to the place of payment, he must be deemed to have left that circumstance to the discretion and control of the maker. But if the maker should appoint a place at some unreasonable distance, or in bad faith, to the prejudice of the indorser, it might change the application of the rule. This, however, was not such a case, and it was not pretended that the indorser had been injured by the maker's appointing the place of payment. He had regular and prompt notice of the demand and refusal of the maker to pay at the place appointed.

This is the substance of the opinion of the supreme court, and the reasonableness of that opinion is well calculated to make an impression upon every impartial and enlightened mind.

The note in question was intended as a renewal of a former note held by the Bank of America, and indorsed by the same indorser. The special verdict further adds: That the defendant had not any knowledge that "any of the former notes" had

been made payable, or discounted, at any bank in New York. From these expressions, "any of the former notes," it would appear that the now plaintiff in error had been in the habit of indorsing notes for Mr. Kane, and he must be considered as having unlimited confidence in the maker, in continuing to indorse for him, without any inquiry where the former notes had been discounted, and where the present notes was to go to meet the call on the former one. It must have been matter of perfect indifference to the indorser, or he would have made some inquiry. It is very possible that the former note, which this was intended to take up, had the same direction given to it in the margin, as to the place of payment, though the now plaintiff may not have known it when he indorsed the present note, and that many, and perhaps all of the former notes, of which the special verdict speaks, had the same direction. This was a general note, without any place of payment in the body of it; it consequently left the place of payment at large, and certainly it left the maker at liberty to pay it wherever he could find it, and to get it discounted wherever and at whatever bank he pleased. The place of payment was not material, because it was not made a part of the note.

The verdict states that the defendant had not any knowledge that any of the former notes had been discounted at any bank in New York; but some of them may have been discounted at Troy or Schenectady, or Utica, with this knowledge, and under the same direction. It would have been very desirable that the former practice between the parties to which the verdict alludes, relative to the drawing, indorsing, discounting and paying, and directing the place of payment, had been fully settled, so that we might have known how far the memorandum in the present case was, or was not, a surprise upon the indorser. The verdict says that the memorandum made by Mr. Kane, in the margin of the note, was made without the knowledge or consent of the indorser. But this does not imply that it was made against his consent. It only means, that in this case, the indorser knew nothing of what was done with the note after he indorsed it in blank, and handed it back to the clerk from whom he received it. He possessed an entire confidence in the ability, prudence, and discretion of the maker; touching the disposition and discount of the note. I have no doubt that confidence had been justified by the former dealings between them, in negotiable paper. He did not choose even to inquire where the former notes which he had indorsed had been discounted. There is no

evidence, nor any ground even, for inference, that it was against his consent, to have the former note discounted at a bank in New York; and the maker acted in perfect good faith, and without any abuse of his discretion, when he sent the note to New York to be discounted at the Bank of America, and gave notice, by his memorandum, that he should pay it there. It may be that the former note discounted there had the same direction, and if the bank had even been misled as to the place of demand of payment, who can say that the former note, and perhaps I may say, many of the former notes, of these same parties, had not misled them.

Every reflecting mind will perceive that if the Bank of America have been misled by trusting to the memorandum, it is the very plaintiff in error who may have contributed to mislead them. This he may have done by his former practice, and by indorsing in blank a new note for James Kane, without making any kind of inquiry as to the disposition of the former note. He knew most certainly that there was a former note outstanding which he had indorsed; and he must have known from the date, and from the sum, and other circumstances, that the note in question was intended as a renewal of a former note; and why did he not ask and obtain an explanation where this note was going. He suffered the maker to use it as he pleased, by sending it to the Bank of America, and to use it as a payment of the former note. If the prior note was paid (as it certainly was, without objection from the indorser), had not the bank good reason to conclude that the present note was also to be paid there by the assent of all parties? How could the bank know but that the memorandum had been agreed to by the indorser? And can the indorser, with any share of justice, now be permitted to say that the bank had no business to trust to the maker's assurance that he would pay this second note there, and that they ought to have taken the note out of the bank, and sent it up to Albany to be ready on the day? If they had done so, the indorser might have had much more color of reason to complain; and he appears to me to be most justly and equitably estopped by his own act from taking advantage of the confidence which the bank reposed in the memorandum.

The indorser, then, in this case, by indorsing a note in blank when the note itself had not designated any place of payment, and the note was intended, as he well knew, to meet and take up a former note which he had indorsed for the same maker, and by abstaining from all inquiry where the note was going,

or where the former note had been discounted, must be considered as having left it in the discretion of the maker to get the note discounted where he pleased, and to place funds where he pleased to pay it. He voluntarily placed the note entirely under the maker's control. If any person is really to suffer by the memorandum, it ought to be the indorser who inspired the confidence, and not the bank who acted upon that confidence. But in fact the memorandum worked no real injury to any one, for it is to be inferred from the case that a demand anywhere would have been equally ineffectual; the maker had stopped payment, and was without funds to take up the note, and the plaintiff in error is now endeavoring to get rid of the obligation of his indorsement, on the formal but dry technical objection that the bank being misled by the memorandum in the margin of the note, did not make the demand upon the maker at the proper place.

I shall presently pay attention to this technical objection; but it will be proper and useful, in the first place, to examine a little into the doctrine of commercial law on the subject of blank indorsements, and of the very extensive responsibility of an indorser, where a *bona fide* holder of negotiable paper for a valuable consideration is concerned. The conclusion from that doctrine appears to be, that the indorser in this case is as much bound by the memorandum to the *bona fide* holder of the note, as if he had expressly assented to it when he indorsed his name.

I shall first look at a few cases to extract the principle, and shall then make an application of it to the case before us. In *Lambert v. Oakes*, 1 *Ld. Raym.* 443; 1 *Salk.* 127, Lord Holt laid down the following rule relative to negotiable notes: 1. That in an action against the indorser it was not necessary to prove the hand of the maker, for though the note be forged, the indorser is liable to a *bona fide* indorsee; 2. That if the indorsement be in blank, the indorser puts it in the power of the holder to overwrite what he pleases, and he may use it as an acquittance or an assignment. Afterwards in *Swellwood v. Vernon*, 1 *Str.* 478, decided in 1721, the K. B. declared that every indorsement was the same as making a new note; so that if the note be payable on the first of May, and the indorsement appoints it to be payable on the first of April, it is a promissory note, as to the indorser, payable on the first of April.

So stood the law a century ago; and to come down to the time of Lord Mansfield, who has been styled the founder of the



English commercial law, it was admitted by the K. B. in *Archer v. Bank of England*, Doug. 637, that the negotiability of a bill might be restrained, and the responsibility of the indorser limited, by a special indorsement. The same doctrine was held by the supreme court of Massachusetts, in *Rice v. Stearns*, 3 Mass. 225. On the other hand, if the indorsement be written on a blank note or check, it will bind the indorser to any sum and time of payment to which the person to whom he intrusts the note chooses to insert. Such an indorsement on a blank note was, as Lord Mansfield said, a letter of credit for an indefinite sum: *Russel v. Langstaffe*, Doug. 514. So again in *Peacock v. Rhodes*, Doug. 63, decided by the K. B. in 1781, an inland bill of exchange, with a blank indorsement, had been stolen, and then negotiated by the thief to a third person, in the ordinary course of business, and he was allowed to recover against the drawer. It was in that case that Lord Mansfield declared, with the approbation of the whole court, that the law was settled that a holder, coming fairly by a bill or note, had nothing to do with the transactions between the original parties, for if he had, it would stop the currency of those bills. There is no difference between a note indorsed in blank, and one payable to bearer; they both go by delivery, and possession proves property in both cases.

We have a series of American decisions to the same effect. Thus, in *Josselyn v. Ames*, 3 Mass. 274, the defendant indorsed a note in blank, and gave it to the plaintiff, who wrote over the indorsement a guaranty of the payment of the contents of the note on demand. No demand on the maker was proved, and the note was not negotiable. The court decided that the plaintiff could not recover in the form of action then adopted; but they said he might cancel what he had written over the blank indorsement, and fill it up with a simple promise to pay the contents of the note to the plaintiff. He did so, and the court thereupon rendered judgment for him. Again, in *Putnam v. Sullivan*, 4 Mass. 45 [3 Am. Dec. 206], it was held that where a merchant intrusts his clerk with a blank indorsement, and another person, under a false pretense, obtains it and negotiates it, the indorser must pay the innocent holder. He is the one of two innocent persons who ought to suffer for his misplaced confidence, and in forming that opinion, the court observed that they had been necessarily led to consider the effect of a different opinion on the commercial part of the community. Where merchants are in the habit of indorsing for each other

at the banks, it is very common to put their names on blank paper, and deliver them to the party to be accommodated, for the express purpose of obtaining a renewal of certain notes when they became due, and if the parties having these signatures should misapply them, much injury might result to innocent indorsers, or the bank discounts would be greatly embarrassed, if the signatures should, for that reason, be void.

These observations of the Massachusetts court, in several material respects, apply to the very case before us; and it is to be recollected that they were the remarks of Parsons, C. J., who was greatly and justly eulogized by one of the counsel on the part of the plaintiff in error. Afterwards, in *Thurston v. McKown*, 6 Mass. 428, in the same court, it was held that where a note was obtained by unfair means, the maker was still liable to an innocent and *bona fide* indorsee. The question, said Parsons, C. J., was whether the loss should fall on the *bona fide* purchaser of the note, or on the maker, who was defendant; and it is settled law, that of the two innocent parties in a case like this, the loss shall fall on the maker. The indorsee gave credit to his name, and on this credit he gave a valuable consideration. The maker suffered himself to be overreached, and by his inattention or negligence, or undue confidence in the payee, the note has been negotiated, and has honestly and fairly come in the possession of the plaintiff, to whom no fault or indiscretion can be imputed.

The same principle was declared in the supreme court of appeals in Virginia, 5 Munf. 581, within the last four years. It was held, that if a promissory note, negotiable at the bank, and indorsed for the purpose only of obtaining accommodation for the maker, be fraudulently put in circulation by an agent of the maker, instead of being put in bank for discount, the innocent holder, for a valuable consideration, can, nevertheless, sue and recover of the maker and indorser.

The federal courts have adopted the same rules on the subject of negotiable paper. Thus, in *Codwise v. Gleason*, 3 Day, 12, decided before Mr. Justice Livingston, in the circuit court of the United States, for the district of Connecticut, it appeared that the defendant was an indorser of a note given by the maker, on a consideration which was fraudulent and void. The indorsement was merely for the accommodation of the maker, who was sued upon the note, and who successfully defended himself on account of fraud in the contract for which the note was given. The indorser was then sued, and it was contended

for him that as the note was void as against the maker, it was of course void as against the indorser, for the indorsement was in the nature of security, and the indorser was to be regarded as a surety for the maker. On the part of the plaintiff it was urged, that the contract of the indorser was, in every case, that the sum contained in the note should be paid when due, and that it made no difference whether the note was not paid by the maker, because he was unable, or because the instrument was void. Let the cause of failure be what it may, the indorser is liable. If the note be forged, the indorser is, nevertheless, holden upon his indorsement, for it was his duty to know the maker's hand, and not suffer an innocent purchaser of the note to be deceived under the sanction of his name. The learned judge admitted that if the note was forged, the indorsement would bind the man who made it, and that the indorser who gave the weight of his name to the world, must be responsible to every man who trusts the note, relying on his credit, as every subsequent indorsee must be supposed to do; and upon his opinion the plaintiff recovered.

I have now finished the review of the authorities which I intended for this branch of the argument, and it cannot have escaped the discernment of the court that the doctrine which we have traced through such a series of English and American decisions presses with accumulated force upon the present case. The note in question was indorsed in blank for the accommodation of the maker, and delivered back to him, to be used when and where he pleased, without direction or restriction. It was not put in circulation fraudulently, contrary to the agreement between the maker and the indorser. That is not pretended; nor has there been any abuse of confidence between them as to filling up the blank indorsement. The maker sent it for discount to a bank in New York, where a former note, drawn and indorsed by the same parties, had been discounted, and which this was intended to meet, and he made a memorandum in the margin of the note that it would be paid there. What could be more natural or more business-like than this? The bank receive and discount the note for the use of the maker, in renewal of the former note, and must innocently follow the direction of the memorandum, and consider the bank as the place where the note, when due, was to be demanded and paid. These indorsers had a right to consider that memorandum as made with the knowledge and consent of the indorser; and if there was a deception practiced upon them in that respect, the

indorser enabled the maker to do it, by returning the note back into his possession with a blank indorsement, without any place of payment designated, and without giving any direction where the note was to be negotiated, or discounted or paid. He left those things at large to the will and pleasure of the maker; and shall an innocent and *bona fide* indorser, who has given full value for the note, now lose it, and be cut off from all recourse against that indorser, because he reposed confidence in the memorandum? Who led the bank to repose that confidence, and who set the example of unlimited confidence? It was this very indorser, under the credit of whose name the note was discounted, and who had given such plenary indulgence to the maker. If the clerk who carried the note to the indorser, and received his name, had fraudulently put the note in circulation, or if the note he received for indorsement had ever been forged, yet we have seen by all the cases, ancient and modern, English and American, that the indorser would still have been holden to an innocent indorsee. He would have been holden, because by indorsing it he gave his sanction to the public that it was a genuine note, and because negotiable paper circulates in the mercantile world as cash, and the party who enables such notes to be put in circulation ought to suffer rather than the fair and unsuspecting purchaser. Can it be possible that the present indorsee is to lose the note, and the present indorser escape responsibility, when he sent the note back to the maker, and enabled him to put such a harmless and convenient direction on the margin of it as to the place where the holder was to look for payment? Shall the innocent indorsee be safe against fraud and forgery, and yet lose his entire debt by means of his memorandum? This would be to subvert the policy and established principles of law in respect to negotiable paper. It would shake the confidence of merchants, and of all our banking institutions, in its circulation and security.

If this note had passed out of the hands of the maker to the indorser for a valuable consideration, such a memorandum, after indorsement, never could or would have been made. The maker in such a case would not come into the possession of the note after it was indorsed until he had taken it up. It is only in these cases of accommodation notes, where the indorser hands the note back again to the maker to be used by him according to his own convenience, that such a memorandum, after indorsement, will ever appear. By this very confidential communication between maker and indorser, the former is enabled

to make the memorandum, and designate the place of payment. Every act of the maker in such a case that is consistent with the two essential ingredients of the note, viz., the amount and the time of payment, is to be regarded by the holder as the act of both parties, for the note is put in circulation as their joint act. In this case it was also put in circulation for their joint benefit, because it was given in renewal of a former note drawn by the one, and indorsed by the other. The proposition strikes my mind as quite unreasonable that the indorser should now be permitted to object that his confidential friend, the maker, under the shadow of his accommodating indorsement, had beguiled the *bona fide* holder by fixing the place of payment at New York, and thereby released him from the note. The bank knew that this note was indorsed for the accommodation of the maker, because the note was in his possession, and sent for discount on his account, and they had just reason to infer that the memorandum was the act of both parties. And this, I say, is the conclusion of law under the circumstances of the case; for though the special verdict finds that the memorandum was not made with the knowledge and consent of the indorser, in point of fact, yet it may still have been made with his knowledge and consent, in point of law. But from the view which has been taken of the case, and of the doctrines which govern commercial paper, it is perfectly immaterial whether the memorandum was made with the consent or against the consent of the indorser. It is sufficient that the holder had a right to presume that consent, and that the indorser gave the maker the means and the opportunity so to act and direct; and upon every principle of law and justice, the *bona fide* holder ought not to suffer, even if the maker had in this respect abused the confidence of the indorser. But there is no pretense of any abuse. The note was, in fact, a dead letter, according to the understanding of both maker and indorser, and was of no use or operation until it had been negotiated by the maker, and that was after the making of the memorandum. The memorandum is, therefore, to be taken as coeval in point of time with the legal existence of the note, and the indorser was in judgment of law a party to that memorandum. I conclude, therefore, with the most entire conviction, that the indorser is not at liberty to object to the memorandum, or to the validity of the demand of payment which was made in pursuance of it.

2. We will, in the next place, proceed to consider how far there is any real intrinsic weight in the objection, that demand

of payment was not made at the proper place, even according to those precise technical rules, which have been created by the law-merchant, applied to negotiable paper. To charge the indorser of a promissory note, it is necessary that the holder, when the note falls due, should make a demand upon the maker or use due diligence to make the demand, and should then give notice, or use due diligence to give notice, to the indorser of such demand and refusal. A demand was made in this case, when the note became due, and at the place appointed for that purpose by the maker, and due notice of non-payment was given to the indorser. It is not disputed but that the demand was at the proper time, and that notice was given promptly upon that demand to the indorser. The only objection is, that the demand was not made at the proper place. It was made at the bank in New York, where the note had been discounted, and where the maker, by his memorandum, had said he would pay it, but it is contended by the indorser, that it ought to have been made, either upon the maker personally, or at his place of residence in Albany. The indorser does not allege that any loss or injury has been sustained, by making the demand in the one place and not in the other, or that the demand could have been answered, or have been more effectual with the maker, if it had been made at the other place. Nothing of this kind is pretended. He puts himself upon the strict rule that he is not holden as indorser, unless the demand on the maker was made precisely at the place where the maker resided.

I am much mistaken, if the rule is not attempted to be pushed, in this instance, far beyond the reason of the thing and the usages of law. The question turns, in most cases, upon what is to be deemed reasonable diligence in making a demand upon the maker. The general rule is, that the bill or note must be presented at the place where it is payable, and a presentment or demand at such place is sufficient; but if no place of payment be prescribed or designated by the maker or acceptor, as the case may be, then the demand must be upon the party personally, or at his place of residence if known and accessible. But if a place of payment be specified by the maker of the note, or acceptor of the bill, then the demand is to be made at such place, in order to charge the indorser or drawer. I shall first examine the law more particularly as to accepted bills.

A great many cases were cited, and a good deal said upon the argument, relative to the analogy between bills of exchange and promissory notes. The supreme court alluded to that analogy

in the opinion delivered by the chief justice, and it was very justly observed that "the maker of a note is to be regarded in the same light as the acceptor of a bill, and that nothing was more common among merchants in England than for the acceptor of a bill payable in a given number of days, to accept the bill payable at the banker's, the bill itself being silent as to the place of payment. And it has uniformly been held that a presentment of the bill at the place appointed by the acceptor for payment is sufficient, and dispenses with the necessity of a personal demand." I think there is a strong argument in favor of the memorandum in the present case, to be drawn from this usage of merchants, in respect to bills of exchange; but I do not mean to go at large into this part of the subject, but merely to touch upon it just enough to enable us to perceive and clearly understand the force and application of the analogy.

We have a statute upon this subject taken from the 8 and 4 Anne; and which was revised and re-enacted the twenty-first of March, 1801. It declares that the indorser of negotiable promissory notes shall be liable in like manner, as in cases of inland bills of exchange, according to the custom of merchants. I do not know in how many of the other states this statute of Queen Anne has been re-enacted; but this I have observed, that the law-merchant on this head is the same throughout the Union, and that indorsed promissory notes and bills of exchange are governed by the same rules and the same usage of merchants.

Thus, it was decided by the supreme court of South Carolina, 1799, 2 Bay, 217, that as long as a note of hand remains unindorsed it has no similitude to a bill of exchange; but when it is indorsed the resemblance begins, and it is governed by the same rules. The maker of the note is in the nature of an acceptor of the bill, and the indorser of the note is in the nature of the drawer of the bill, and the holder of a note so indorsed must show a demand or due diligence to get the money from the maker of the note, before he sues the indorser, in like manner as the person to whom a bill of exchange is payable must show a demand or due diligence to get the money from the acceptor, before he sues the drawer. The rule, say the South Carolina judges, is exactly the same upon promissory notes as it is upon bills of exchange.

So, also, the chief justice of the supreme court of Connec-

ticut, in delivering the opinion of the court in *Dwight v. Scovel*, 2 Day, 654, observed, that in all cases of accepted bills, and indorsed notes, it is necessary for the holder of the bill or note, to present the same, the one to the acceptor, and the other to the maker, when they fall due, and demand payment. So, again, in the supreme court of the United States, in *French v. The Bank of Columbia*, 4 Cranch, 141, the same law was admitted and declared. The counsel, Mr. Harper, observed, that when a negotiable promissory note is indorsed, it is in truth an inland bill of exchange, drawn by the payee or indorser, in favor of the indorsee upon the maker, and by him accepted. Hence, says he, the law with respect to both kinds of paper is the same. The contract of the first indorser of a promissory note was the same as that of the drawer of a bill of exchange; and the forms of that contract were well known by a reference to the law-merchant. The chief justice of the United States, in delivering the opinion of the court, traces, through a variety of cases, the reasoning and the rules relative to bills of exchange, and then applies them to an indorsed promissory note in the case before him. He says that the indorser of the note is to be considered as the drawer of a bill, and the maker of a note as the acceptor of a bill.

If, according to our statute, and according to universal usage, wherever the law-merchant prevails, the indorser of a note is liable in like manner as in the case of inland bills of exchange, then we are only to inquire what demand of payment upon the acceptor of a bill will be sufficient to charge the drawer of the bill, because the like demand upon the maker of a note will be sufficient to charge the indorser of the note. There can be no escape from this conclusion, for we have the very words of the statute, that they shall be liable in like manner. Now it is the settled rule of law, and the settled usage of merchants, that if a bill of exchange be drawn by A. upon B. for such a sum, payable at such a time, in favor of C., and no place of payment be designated in the bill, and B. accepts it generally, the demand of payment, when the bill comes to maturity, must be made upon B. personally, or at his place of residence. But if he accepts it specially, by saying, payable at such a place, or at such a bank or bankers, as is usual with merchants, then payment is to be demanded at such a place, and a demand and refusal of the acceptor at the place appointed, will be a sufficient demand to charge the drawer. It was so decided by the K. B. in *Parker v. Gordon*, 7 East, 365, and by the C. B. in *Ambrose v. Hopwood*, 2 Taun. 61.



There are contradictory cases in the English courts in respect to the sufficiency of such a demand, on such a special acceptance, if the suit be against the acceptor of the bill, and in respect to the sufficiency of such a demand, where the place of payment is incorporated in the body of a note, and the suit is against the maker of the note. *Fenton v. Goundry*, 13 East, 459; *Lyon v. Sundins*, 1 Campb. N. P. 423; *Head v. Sewell*, 1 Holt, N. P. 363; *Smith v. De la Fontaine*, tried before Lord Mansfield in 1785, and cited by Mr. J. Holroyd, in *Rowe v. Williams*, in K. B., in 1816, cited in note to 1 Holt, 364; *Wolcott v. Van Santvoord*, 17 Johns. 248, are cases to show that in a suit against the acceptor of a bill, a demand at the place specified in the acceptance need not be averred or shown, for that he is liable, notwithstanding such acceptance, generally and universally: *Callaghan v. Aylett*, 3 Taun. 397; 2 Campb. N. P. 549; and *Gammon v. Schmoll*, 5 Taun. 844, are cases to show that a demand at the place specified is necessary to charge the acceptor, and that there was no distinction for that purpose between the drawer and acceptor.

So *Saunderson v. Bowes*, 14 East, 500; *Trecothick v. Edwin*, 1 Starkie, N. P. 468; *Dickinson v. Bowes*, 16 East, 110; *Bowes v. Bowe*, in the exchequer chamber, 5 Taun. 30, are cases to show that if the place of payment be embodied in the note, a presentment at the place must be averred and shown to charge the maker: *Nicholas v. Bowes*, 2 Campb. 498; *Butterworth v. Lord Le Despencer*, 3 Mau. & Sel. 150, are cases to show that a demand at the place specified, though embodied in the note, is not necessary to charge the maker of the note. But I shall not now meddle with those cases, nor interfere with that controversy. It is sufficient, for the purpose of this case, that all the authorities admit, without a single exception, that if the acceptor of a bill of exchange, containing in the body of it no place of payment, accepts, payable at a particular place, a demand at such a place is sufficient to fix the drawer; and if the acceptor of a bill stands in the same situation, and assumes the same character as the maker of an indorsed note, and especially as the maker of an accommodation note, indorsed and returned to him for his use, then the maker of a note so returned to him may direct the place of payment equally with the acceptor of a bill, and a demand at such place will be sufficient to charge the indorser. The analogy is perfect, the responsibility the same, the duties the same, the reason the same, and the law-merchant governs both cases by the same impartial rule, and with equal and irresistible application.

A bill of exchange when presented to the drawee for acceptance, is just as perfect, and no more perfect than as an accommodation note indorsed and returned to the maker. It then becomes, to use the language of the South Carolina judges, in a case already cited, an order by the indorser on the maker of the note, to pay the contents to the indorsee. And when the maker puts such a note in circulation, or hands it to a bank for discount for his own use, the wit of man cannot invent a reason why the maker should not have as good a right to direct the indorsee where to look for payment as the acceptor of a bill to direct the payee where to call for payment. It is impossible to create a distinction, and, therefore, the rule must be the same in both cases. It is then settled without contradiction, that the acceptor of a bill may make a special memorandum or intimation, under his acceptance, where the holder is to call for payment, and a demand at that place is sufficient to dishonor the bill, and to fix the drawer. So, here the maker of the accommodation note, when he puts it in motion, may, by a memorandum in the margin, at the foot, or on the back of the note, or by a letter, or memorandum on a separate paper, inform the discounting bank, or the indorsee, or holder, where to look for payment when the note falls due, and a demand at such place is sufficient to dishonor the note and fix the indorser. In my opinion, no two cases more entirely analogous in the reason and in the law of them, can be presented to the human understanding.

It was said lately in the English house of lords, in the case of *Benson v. White*, 4 Dow. 338, that the practice of accepting bills payable at the banking house, or at some particular place, or by some person other than the acceptor himself, has of late years, become universal. The practice was a great convenience to both holder and acceptor; to the holder, because, by having a bill payable at a house of business, he is certain of finding some person who will give him an answer, whether the bill is to be paid or not; to the acceptor, because it facilitates the keeping accounts, and enables him to pay, where he has the means, and if he should have occasion to leave his residence, his acceptor may be paid in his absence. Lord Ellenborough, also, in the case of *Fenton v. Goundry*, dwelt much upon the convenience and utility of this mercantile usage of pointing out by a memorandum at the time of acceptance of a bill, where the holder might call for payment. Acceptors, says he, may change their residence while the bill is running, or they

may dwell at one place, and carry on business at another. Many persons, during the hours when payments are usually made, are often occupied elsewhere than at their own houses, and therefore, his lordship observes, it has become a frequent practice in order to avoid inconvenience to the holder, for the acceptor to intimate or point out his bank of deposit, or some other place, as his house of residence, if he may so express it, for that purpose. This practice, like most other mercantile usages, has been dictated by common convenience, and has grown out of the mutual accommodation of the parties concerned. It has crossed the Atlantic, and been adopted in our own commercial cities. It equally accommodates the holder and acceptor of a bill, and the holder and maker of a note, and any decision of this court, disturbing this usage, might work infinite mischief, and would be deeply to be regretted.

But without dwelling longer on the analogy between this case and that of accepted bills, I shall now attempt to show that the question before us has been settled by cases in point, both in England and in this country. The first case I shall refer to is that of *Saunderson v. Judge*, 2 H. Bl. 509, decided in the English court of common pleas, in the year 1795. That was an action on a promissory note by the holder against the indorser. At the foot of the note there was a memorandum made by the maker, that he would pay it at the house of Saunderson & Co., with whom he had a cash account. The note had been negotiated through several hands, and came to the same house of Saunderson & Co., who were bankers, and holders of the note when it became due, and plaintiffs in the suit. The maker had absconded before the note fell due, and no demand was made upon him, or at his usual place of abode. The question raised on behalf of the indorser, was, whether it was not incumbent on the plaintiffs to prove a demand on the maker. The court decided that the place of payment was no part of the contract in that case, and that the maker had merely appointed the house of his banker as the place where he was to be called upon for payment, and where it would be paid. It was not necessary, they observed, that a demand should be personal, it was sufficient if it be made at the house of the maker of the note, and it is the same thing, in effect, if it be made at the place where he appoints it to be made, and as they at whose house it was to be paid, were themselves the holders of it, it was a sufficient demand for them to turn to their books, and see the maker's account with them, and a sufficient refusal to find that he had no

effects in their hands. This decision was unanimous, and it has stood for upwards of twenty-five years uncontradicted and unquestioned, and it has been uniformly received since, both in England and in this country, as a clear and settled rule of law. The judges who decided it were men of the most distinguished reputation, and the names of two of them are familiar to all the reading part of the profession; I allude to Lord Chief Justice Eyre and Mr. Justice Buller.

The case before us cannot be distinguished from that in any material degree, or so as to divert or weaken the force and application of its authority. The memorandum of the maker at the foot of the note in *Saunderson v. Judge*, was made, no doubt, before it passed out of his hands to the original payee. It could not have been made afterwards, because, when a promissory note is given, as that appears to have been, for a valuable consideration, it becomes instantly the property of the payee, and cannot return to the maker until paid. The maker can never write a memorandum on the note after indorsement, except in the case of an accommodation note indorsed in blank, and returned to the maker, to be used by him at his pleasure, and on his own account. He may then give the direction as to the place of payment, by a memorandum on the note, with perfect safety and propriety; for as the court said in *Saunderson v. Judge*, the memorandum forms no part of the contract, and, therefore, the indorser, who lent his name for accommodation has no right to complain. He has no concern with that direction.

It is a business entirely between the maker and the party who receives the note for discount, and it is for their mutual accommodation, as we have already seen, that a place of payment should be pointed out. The case of *Saunderson v. Judge* is therefore a most decided and most respectable authority on the point before us; and it completely overthrows all the pretensions that, where no place of payment is fixed in the body of the note, a demand must be made either on the maker personally, or at his usual place of abode. These memoranda at the bottom, or in the margin of a note, are quite common, and they are understood as a mere indication of the place of application for payment, and a mere direction for the convenience of the maker and holder. They constitute no part of the note. The contract is complete and perfect without them. So it has been ruled repeatedly in the English courts: *Price v. Mitchell*, 4 Campb. N. P. 200; *Richards v. Lord Milsington*, 1 Holt, N. P.

364, note. But they are sufficient to guide the holder, and direct him to a proper place to demand payment. If the maker, instead of making the memorandum on the note, had sent a letter with the note to the Bank of America, and informed them that he should shortly, and before the day of payment, remove to such a place in the city of New York, or to Newburgh or to Poughkeepsie, or would provide funds at such a place to pay the note, a demand there would have been sufficient, seeing that the note itself was silent as to the place of payment. All that the law requires of the holder is good faith and due diligence in seeking to demand payment when the note becomes due. When the note does not provide a place of payment, the maker may fix the place of payment when he pleases; and any place which he designates with good faith becomes, *quoad hoc*, or in respect to that particular contract, his place of residence.

The next case which I shall mention as being perfectly in point, is that of the *State Bank v. Hurd*, 12 Mass. 172, decided in the supreme court of Massachusetts in 1815. That was a suit by the State Bank, as holder, against the indorser of a promissory note. The note was made payable at the State Bank, but as the counsel and the court seemed equally to have assumed that a demand upon the maker was necessary in order to charge the indorser, the question arose as to what was sufficient demand, and the opinion of the court on the question goes the whole length of the English doctrine. The case states that bank notices were left for the maker, and for the defendant, as indorser, at one Metcalf's shop, in Cornhill, Boston, "by direction of the said Larkin and Hurd (the maker and indorser), respectively." The reporter has not stated this matter of fact with sufficient explanation, and the want of precision in the sentence led the counsel in the case before this court to assume that the place of payment had been designated by the joint act of maker and indorser. But I think this could not possibly have been the fact, and the words do not necessarily warrant that construction; and it is evident that neither the reporter nor the court understood the fact so. The sentence, when read and examined according to the rules of sound criticism, and by taking the parts of it distributively, according to the use of the word "respectively," *reddendo singula singulis* it clearly means that the maker gave direction that the demand as to him should be made at Metcalf's, and the indorser gave direction that the notice as to him should be given at Metcalf's. How they happened to fix upon the same place it is difficult to know, and idle

to conjecture; but it is extremely improbable that the maker and indorser should have entered into an agreement with each other, that the demand upon the one to pay, and the notice of his default to the other, should be given at the same place. The subject of directing a demand upon the one, in order to fix the debt upon the other, was the one of all others the least likely to invite a drawer and indorser to act in friendly concert. The moment a suggestion was dropped of stopping payment and charging the indorser, the latter would naturally put himself in a posture of defense, and instead of arranging the form and manner of the notice, he would be on the alert to ward off the blow, and to secure himself. The whole supposition strikes me as equally improbable and absurd.

But the respectable reporter, Mr. Tyng, must have known better than any other person what was intended by this statement of the case; and we have in the marginal note his commentary on his own text. He gives the substance of the authority in these words: "Where a promisor appointed a place to notify him of his note falling due, a notice duly left at such place was holden sufficient to charge the indorser." And the decision of the court takes no notice of any consent to the place, or appointment of such place, by the indorser, who was the defendant in the suit; but they put their opinion exclusively and entirely upon the fact that the maker of the note had designated in a way distinct from the note itself the place where he was to be called upon for payment. The court say that "the agreement of the promisor that notice left for him at a certain shop in Boston should be equivalent to a formal demand upon him, removed the necessity of resorting to his house or place of business to make such demand; and his failure to pay on such notice rendered the indorser, who had seasonable information, absolutely liable." This is all that the court say on this subject, and they do not put the cause upon the fact of any joint consent, nor do they even so much as allude to any consent of the indorser.

This case, then, like the one in the C. B., is entirely applicable, and it comes to us with the weight of authority. We have the same decision on the same point, by two courts of the first character on both sides of the Atlantic. And it is worthy of notice that the courts were unanimous, and treat the question as one perfectly plain and easy of solution. I should, then, certainly think that I was bound to apologize to this court for having dwelt so long upon the case, if I had not found a suffi-

cient excuse in the exalted station of the individual who raises the objection, and in the distinguished rank of the counsel whom he has employed to support it.

The doctrine laid down in the English case of *Saunderson v. Judge*, has not only been adopted in Massachusetts, in the case just cited, but it has been received and recognized as sound law in the courts of other states. Judge Southard of New Jersey, 1 South. 25, in one of his judicial decisions, refers to it as his authority when he is speaking of a demand upon the maker sufficient to fix the indorser. Mr. Justice Livingston, also, in delivering the opinion of our supreme court, in 1804, in the case of *Stewart v. Eden*, 2 Cai. 121 [2 Am. Dec. 222], and laying down the rule as to the sufficiency of a demand upon the maker, cites and adopts that very authority. So, Chief Justice Thompson, in delivering the opinion of the supreme court, in the case of *Anderson v. Drake*, 14 Johns. 114 [7 Am. Dec. 442], declares the settled law to be, that a demand of payment at the place where the note was payable is enough to charge the indorser, and he also refers as his authority to this very case of *Saunderson v. Judge*. He says, that where no particular place is appointed for payment, the holder must find the maker. These words he uses on citing the case of *Saunderson v. Judge*, and it shows evidently that he had the doctrine of that case in his mind, and meant that the maker was to be sought, if the maker had not, within the sense of that case, appointed a place of payment. The late chief justice further observed that if the maker had removed out of the state, a demand at the place within the state where the note was given was sufficient. This is a just and reasonable limitation of the extent of the demand, and one would think it was sufficient to put to flight all those extreme cases about appointing the place of payment at Charleston, or New Orleans, or Calcutta, which the fancy of the learned counsel suggested, in order to give to the usage an alarming appearance, and when we now consider that this doctrine of the English law has never in one single instance been questioned, either at home or abroad, and when we consider what a deep root it has taken in these United States, and under what a venerable sanction it has been received and incorporated into the mercantile law of the land, we are certainly called upon to make too costly a sacrifice of our usages and customs, if not of our reason and judgment, merely to relieve the indorser in this particular case. Even if the question was doubtful in our minds, I should think that the unanimous opinion of so learned and

respectable a tribunal as the supreme court of this state would, of itself, be sufficient to turn the scale.

The law-merchant, relative to bills of exchange and indorsed notes, and commercial paper generally, is not the law of this state only, but of all the states of the Union, and of all the commercial nations of Europe. The maker and indorser of a note, and the drawer and acceptor of a bill, are subject substantially to the same rules and conditions in one country as in another. The law-merchant, says Malynes, in the time of King James, is a "customary law, approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any one prince." It is the most rational and the most liberal of all codes, and prevails everywhere within the region of commerce. I may refer, as an example, to the new commercial code of France, which was only a digest of the former law of France on the subject, and which establishes, with much minute precision, the same rules which prevail in the English, and in our law, relative to bills and notes. There must be the same demand upon the maker, and the same notice to the indorser, and the code points out where the demand must be made by the notaries. It must be made at the domicile, or place of residence of the party. The word "domicile" in the French law, according to Mr. Duponceau, the learned translator of the French commercial code, has a general and a particular meaning. In the former case it means the party's usual place of residence; but in the language of legal practice it signifies a specific place of abode, declared, assumed, or pointed out by the instrument or contract. For the purpose of a particular contract, the parties elect their domiciles at such or such places, and a summons regularly served at the place of the elected domicile is sufficient. So, he says, a bill of exchange, when not payable at a particular place or domicile of the acceptor, as where funds happen to be lodged in another place, is usually accepted in this form: Accepted at Bordeaux, payable at the domicile of A. B., merchant in Nantz. The legal effect of this special acceptance is that the demand and protest must be made at Nantz, and not at Bordeaux: *Vide* Duponceau's translation of the Code de Commerce, art. 123, 161, 173, in the American Review, vol. 2, appendix, 110, note 50; 118, note 66.

The court will perceive that the French law is precisely the same as the English on this subject, and where the place of payment is not fixed in the contract itself, it is no part of the



contract. The maker or acceptor, who has at all times a perfect right to shift his domicile, or place of residence, as often as he pleases, may, as a matter of course, and to suit his convenience, or to suit the convenience of the holder, point out the place where he will be, or where he will provide funds to meet the payment, and such place becomes in respect to that contract, his place of residence, and a demand upon him there is sufficient.

To conclude, then, I think that the following propositions are well founded:

1. That the bank had a right to presume that the memorandum in the margin of the note was made with the knowledge and consent of the indorser, inasmuch as it was an accommodation note, indorsed in blank, and handed back to the maker, and transmitted by him to the bank to take up a similar note, drawn and indorsed by the same parties. But whether the memorandum was made with or against the consent of the indorser, is immaterial in respect to the *bona fide* holder who came by the note in the course of business, and for a fair and valuable consideration, without notice of any objection on the part of the indorser. The demand upon the maker, in pursuance of the memorandum must be equally valid and binding upon the indorser in either case; and this upon established principles of law, in respect to commercial paper.

2. That the note, when indorsed, became, by the words of our statute, and by the general law-merchant, likened to an inland bill of exchange, and the parties were rendered liable in like manner. It followed, therefore, that the maker of the note, after it was indorsed in blank, and returned to him for his use, stood in the character of an acceptor of a bill, with equal rights and responsibilities, and he had authority to designate the place of payment, as none was mentioned in the note. That the acceptor of a bill has such a right, is everywhere, and by every person admitted.

3. That such a memorandum, made out of the body of the note, and being a mere intimation of the place of payment, was no part of the contract; but it was sufficient to justify the holder to call at such a place for payment, and being refused he had a right to look to the indorser. This is a clear, settled rule in England, and it has been repeatedly recognized in this country and in this state.

Nothing, in my humble judgment, can be more reasonable, nothing clearer, nothing better established than these rules; and I am accordingly of opinion, that on either of these grounds,

the judgment of the supreme court was correct, and that it ought to be affirmed

ADAMS, BARSTOW, FORWARD, FROTHINGHAM, HART, MILES, McMARTIN, PAINE, and ROSENORANTS, senators, were of the same opinion.

B. SKINNER, Senator. In determining this cause, we are to take into consideration the situation of the parties at the making of the note in question, the nature of the indorser's contract, the alteration, if any, which has been made in it by the appointment of a place of payment in the maker's memorandum, and the effect of such alteration upon the liability of the indorser.

At the making of the note, both the drawer and indorser resided in Albany, where they still reside, and as the note specified no place of payment, the law imposed upon the holder the necessity of demanding it of the maker personally, or at his residence. The indorser's contract, then, was to pay to the holder the amount of the note, in case of default on the part of the maker, provided payment should, in due time, be demanded of the maker personally, or at his residence, and provided notice of non-payment should be duly transmitted to the indorser.

The memorandum made by James Kane, transferred the place of payment to the Bank of America, and, in my opinion, was a material alteration of the indorser's contract. It was contended on the argument of this cause, and has been so decided by the supreme court, that the place of payment is no part of the contract, and that, therefore, the memorandum did not alter the contract as between the immediate parties to the note. I cannot assent to this proposition. On the contrary, it appears to me that the place of payment, next to the sum payable, is the most essential part of the contract; for on its proximity or remoteness must depend, in point of time, the indorser's knowledge of non-payment, which, in most cases, must to him be a matter of great importance. And I apprehend that a merchant of this city, when about to indorse negotiable paper, would deem the contract into which he was entering as materially different, whether the note was made payable at Albany or at New Orleans. He would, undoubtedly, take into consideration, in estimating the responsibility he was to incur, that in the one case he would receive notice of his liability, in case of dishonor, the same day; but in the other, not until twenty or thirty days after he became charged with the amount.

On a careful examination it will be found, that the authorities cited by the supreme court do not warrant the doctrine contended for; it seems to have grown out of the opinion of the court of C. B., in the case of *Saunderson v. Judge*, 2 H. Bl. 509. But that part of their opinion, in which it is held that the place of payment is no part of the contract, is wholly extrajudicial, a mere *dictum*, unsupported by authority, not called for by the subject-matter, and inconsistent with the judgment given in the cause. That *dictum* has also, in effect, been overruled by the same court, in the cases of *Ambrose v. Hopwood*, 2 Tann. 16; *Callaghan v. Aylett*, 3 Id. 397; and *Gammon v. Schmoll*, 5 Id. 354; and by the court of king's bench, in the cases of *Saunderson v. Bowes*, 14 East, 500; and *Tidmarsh v. Grover*, 1 Man. & Sel. 735, cited on the argument, in each of which cases, and particularly in the last, the place of payment was held to be a material part of the contract. The case of *Saunderson v. Judge* is also inapplicable, because there can be no doubt that the memorandum at the foot of the note, designating the place of payment, was made by Sharp, the maker, prior to the indorsement by Judge, and of course with his assent.

The case of *Trapp v. Speerman*, 3 Esp. 57, is not only a *nisi prius* decision, but is wholly done away by the case of *Saunderson v. Bowes*. The case of *Price v. Mitchell*, 4 Campb. 200, is unlike the present, inasmuch as the memorandum in the margin was not signed, and did not profess to designate the place of payment, but only to point out the maker's residence; and even in that case, Gibbs, chief justice, in delivering the opinion of the court, observed that if the words had been inserted in the body of the note, they would have formed part of the contract. Nor is the doctrine supported by the case of *Wolcott v. Van Santwood*, 17 Johns. 248, which has been cited. The chief justice, in his opinion in that case, which was concurred in by a majority of the court, does, indeed, say "that the time and place of payment are merely modal, forming no essential part of the contract;" but he must be understood as speaking with reference to the maker or acceptor; for in the language of Van Ness, J., in the same case, "it is acceded on all hands, and the position is too plain to be denied, that in order to charge the indorser, a demand at the place of payment is indispensable, and that the necessity of such demand is created by the terms of the note." Or, in other words, that as to the indorser, the place of payment is a material part of the contract; and in that very case, the court held the place of payment so far material

in an action against the acceptor, as to require proof of presentment at the place of payment, and in default of it, that the maker could not recover damages and costs. That such must be the true rule is also clear from the effect produced by the maker's memorandum in this case upon the rights and liabilities of the parties. It authorized the holder to present the note for payment at the Bank of America, where, as originally drawn, he bound himself to pay, in the event of non-payment, on a demand being made of the maker personally, or at his residence. By the addition of the memorandum, he is made liable upon a demand of payment at New York, which, but for that memorandum, would have been perfectly nugatory. It rendered valid a notice of non-payment, which was received one or two days later than that which he contemplated at the time of his indorsement, a circumstance by which he does not, indeed appear to have been injured, but which certainly increased his risks, and lessened his prospects of indemnity.

That a written instrument may be varied by a memorandum in the margin, and that the terms of such memorandum are entitled to the same efficacy as if they had been contained in the body of the instrument, is established by the cases of *Starr v. Melcalf*, 4 Campb. 217; *Trecothick v. Edwin*, 1 Stark. 469; *Platt v. Smith*, 14 Johns. 368, and *Jones v. Failes*, 4 Mass. 244. The latter is very much in point. Failes had indorsed a note made by one Clapp, for six hundred and eighty dollars, at the bottom of which, inclosed in brackets, was written these words: "Foreign bills." In an action against the indorser, it was held by the court, that it must be presumed that the words in brackets were written by the drawer of the note; that it was immaterial whether they were part of the original contract, or added in explanation of it; that in either case, they were binding on the parties, as fully as if they had been inserted in the body; and that the note was therefore payable in foreign bills, and not negotiable. For these reasons, I am of the opinion that the original contract was materially altered by the memorandum.

But even if it was not altered, it would be equally fatal to the defendants; for if the original contract was untouched by the memorandum, then the demand of payment ought to have been made of the maker personally, or at his residence, which was not done; and on that ground, the indorser was not charged. The indorser's contract having been thus altered in a material part, without his knowledge or assent, he was thereby discharged from all further responsibility. The rule that a man

is not to be held to a contract which has been varied, without his assent, is perfectly well settled; and if an instance can occur where it ought to be applied with peculiar strictness, it is that of a surety, in which favorable light the plaintiff in error is entitled to be viewed: *Clason v. Morris*, 10 Johns. 538. And in my view it is wholly immaterial, whether the indorser has been prejudiced by the alteration or not. The case of *Ludlow v. Simond*, in this court, 2 Cai. Cas. 30 [2 Am. Dec. 291], confirms this position; and is not less conformable to strict justice than to the rules of law. It was there held by the unanimous opinion of this court, that a surety was not bound beyond the strict terms of his contract; and although in that case the deviation from those terms was not shown to be injurious, but, on the contrary, was probably beneficial to the surety, yet he was discharged by it. We are not to abandon those great principles of natural justice, which are engrafted in the law, because the application may, in particular cases, be deemed rigorous; but whenever they apply, they must, for the sake of uniformity and certainty, be rigidly adhered to.

If the view I have taken of this subject be correct, it is unnecessary to examine the other points made in the argument. But as it has been held by the supreme court, and contended here, that the maker was authorized, without consulting the indorser, to appoint the place of payment at the Bank of America, and that a demand at that place is sufficient to charge the indorser, I shall briefly advert to the grounds on which that position has been maintained. It is said that as the acceptor of a bill of exchange may make his acceptance payable at a particular place, the bill itself being silent, so may the maker of a promissory note, who is regarded in the same light as the acceptor of a bill. No solid argument can be drawn from this source, because the analogy is not complete until the bill is actually accepted; and the right of the acceptor to prescribe the terms in which he will contract to pay, only proves that the maker of a note may draw it in such manner as to meet his own views, a point which is too plain to be denied; but which differs very widely from varying the note after accepted, or, as in this case, after indorsement, which in point of principle is the same, and that without the knowledge of the acceptor, or the indorser.

The position has also been placed on the authority of the *State Bank v. Hurd*, 12 Mass. 172, in which case it is supposed that the supreme court of Massachusetts have recognized the

principle contended for. From the report of that case, I have no doubt that the place of payment and demand, was varied from that specified in the note, by the joint agreement and direction of both maker and indorser; while, in this case, the gist of the indorser's complaint is, that the alteration was made without his knowledge or assent. That case is also understood in this way by Mr. Bigelow, in his valuable digest of the Massachusetts reports; and, indeed, upon any other principle, it would be absurd.

Another, and certainly the most plausible argument in support of the maker's authority to fix the place of payment, is that, as he had the power to alter it by removal or by absence from his usual residence, he was also authorized to do so by written stipulation, or, in the language of the supreme court, "that he could do by agreement, whatever he could do by his locomotive powers." A conclusive answer to this reasoning is, that the indorser, in case of removal, would be equally apprised of the place of demand. In case either of absence or removal, he would have no right to complain, because it was a part of his original contract, and must have entered into his estimation of the hazards he was about to incur at the time of making it. Nor is there anything growing out of mercantile usage, or the commercial law to confer this power on the maker. It is now, for the first time, brought forward in our courts, and, if sanctioned, its consequences would undoubtedly be mischievous. The indorsers of notes, specifying no place of payment, would be unable to calculate with any degree of certainty, where notice of non-payment, in case of such an event, ought to be received by them; and they would, therefore, be subjected to hazards and responsibilities, unforeseen at the time of indorsement, and not to be guarded against by common prudence; for, if the maker in the present case had the power to appoint New York, as the place of payment, he might also have appointed any other place, however remote, as there could be no limits prescribed to the exercise of that power, but his own inclination.

The supreme court aware of this objection, and perceiving the great evils which might result from allowing this authority to the maker, have intimated "that if he should appoint a place of payment so remote as to impose an unreasonable risk on the indorser, it might be considered a fraud upon him." But the uncertainty of such a rule, which would refer the decision of each case to its particular circumstances, and to the discretion

of the courts, would afford but a slight remedy to the anticipated abuses. I greatly prefer the simple and reasonable maxim, that every alteration of the indorser's contract in a part, which, in any event, may become material, without his approbation, shall discharge his liability. This rule is definite and certain; and, in my judgment, is not only founded on sound principles of law, but absolutely essential to the security of indorsers and sureties. No injury can result from it; for its only effect will be to apprise the indorser of the proceedings of the maker, and to require his assent to every part of a contract by which his rights and liabilities are to be tested, and which may eventually have an important bearing upon his property and credit. I am, accordingly, of opinion that the judgment of the supreme court is erroneous, and ought to be reversed.

AUSTIN, BARNUM, BOUCK, BOWNE, DUDLEY, EVANS, LIEFFERTS, LIVINGSTON, LOUNSBURY, LYNDY, MILLER, MOORES, MORE, TOWNSEND, WILSON, YATES and YOUNG, senators, concurred.

This being the opinion of the majority of the court (for reversing, 18; for affirming, 10,) it was thereupon "ordered adjudged and decreed, that the judgment of the supreme court be reversed, and that the plaintiff in error be restored to all things he has lost thereby. And it is further ordered and adjudged, that the defendants in error pay to the plaintiff in error his costs and charges in and about prosecuting his writ of error, and that the record be remitted," etc.

Judgment of reversal.

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This case is of extensive application regarding the alteration in notes which will render them void as to certain parties. Not only is it a leading case in New York, but it is regarded as such in other states. In late adjudications the courts have, on this point, relied on it; as in *Greenfield Bank v. Stowell*, 123 Mass. 196; S. C., 25 Am. Rep. 67; *Glover v. Robbins*, 49 Ala. 219; S. C., 30 Am. Rep. 274; *Gillespie v. Kelley*, 41 Ind. 158; *Herrick v. Baldwin*, 17 Minn. 209.

**GENERAL RULE.**—The general rule is that any material alteration in a written contract, made without the consent of the party sought to be charged thereon, at any time after its execution by him, renders it void as to him, even in the hands of an innocent holder: *Angle v. N. W. Mutual Life Insurance Co.*, 92 U. S. 330; *Greenfield Bank v. Stowell*, 123 Mass. 196; S. C., 25 Am. Rep. 67; *Warrington v. Early*, 2 El. & Bl. 763; *Draper v. Wood*, 112 Mass. 315; S. C., 17 Am. Rep. 62; *Brown v. Straw*, 6 Neb. 537; *Benedict v. Cooden*, 49 N. Y. 396; *Wait v. Pomeroy*, 20 Mich. 425; *Holmes v. Trumper*, 22 Id. 427; *Miller v. Finley*, 26 Id. 249. The ground of the rule seems to be chiefly that the alteration destroys the identity of the contract; and, therefore, if a party to the contract who has not consented to the alteration, were to be held bound by it, it would be, in effect, imposing upon him against his

will a new contract, to whose terms he never agreed. Hence, it is altogether immaterial whether the change made in the contract by the alteration is favorable to, or against, the interest of the party sought to be charged. He is discharged in either case. He is not bound by the new contract, not because it is less advantageous to him than the original agreement, but because it is a contract which he has never made; and the one that he did make is cancelled by the change. The principle is thus stated in *Gardner v. Walsh*, 5 El. & Bl. 82: "We conceive that he is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. If a promissory note payable at three months after date were altered by the payee to six months, or if, being made for one hundred pounds he should alter it to fifty pounds, we conceive that he could not sue the maker upon it after the alteration, either in its altered or original form. The alleged maker was no party to a note at three months, or for fifty pounds, and the note at six months for one hundred pounds, to which he was a party, is vitiated by the alteration." In *Sanderson v. Symonds*, 1 Ball & B. 423, Dallas, C. J., also holds that the basis of the rule is that the contract is vitiated by a material alteration, because its identity is lost, and not because of any actual or presumed fraud. In accordance with this doctrine it was decided in *Brown v. Straw*, 6 Neb. 537, where the principal case was relied upon as authority, that a change in the date of a contract, even though it delays the day of payment, and is thus apparently for the ease of the debtor, avoids the agreement as to him if he does not assent to it. And in a number of cases it has been held that the addition of a new surety to a note vitiates it as to a surety who has already signed it if he has not consented to it, although such addition would seem to be beneficial to him: *Bowers v. Briggs*, 20 Ind. 139; *McVean v. Scott*, 46 Barb. 379; *Gardner v. Walsh*, 5 El. & Bl. 82. In fine, the question in any given case is not whether the party sought to be charged is prejudiced by the alteration, but whether the contract is thereby made to differ in a material particular from that which the party signed.

ORIGIN OF DOCTRINE.—In its origin this doctrine as to the effect of the alteration of written instruments was applied only to deeds, and seems to have been founded upon the solemn character of sealed instruments as evidence. As the deed was the only evidence of a contract under seal, and could not be contradicted, it was highly important that it should declare the true intent of the parties and that it should speak an unvarying and unequivocal language. Hence it was deemed necessary to protect it from every possibility of adulteration or change. The leading case, the fountain head of the law and learning of this subject, is *Henry Pigot's case*, 11 Co. 27, where it was resolved "that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line, or through the midst of any material word, the deed becomes void," and that "if the obligee himself alters the deed by any of said ways, although it is in words not material, yet the deed is void." In *Master v. Miller*, 4 T. R. 320; 1 Smith's Lea. Cas. 1254, the same rule was, for the first time, applied to bills of exchange. *Powell v. Divett*, 15 East, 29, applied it to bought and sold notes, and *Davidson v. Cooper*, 11 M. & W. 778; S. C., 13 Id. 343, extended it to all other written contracts. The doctrine has undergone modification in other particulars also since *Pigot's case*. As will be noticed, the rule stated in that case made no distinction between material alterations, made by a party to the instrument, and those made by a stranger. This was probably



due to the fact that the doctrine was then looked upon as a rule of evidence, mainly, and of course the character of a document as evidence was equally affected by an interlineation or erasure, whether made by a party or by a stranger. Now, however, since the basis of the doctrine is taken to be that the contract is changed by a material alteration, it is proper that it should be restricted to cases where the alteration is made by one who has some interest in and power over the contract; and so the modern decisions hold, as we shall presently see. The rule is further modified, also, in that part of it which relates to immaterial alterations made by the obligee. Such alterations are now held not to affect the contract: *Aldous v. Cornwell*, L. R. 3 Q. B. 573.

**MATERIAL ALTERATION, DEFINITION OF.**—To constitute such a material alteration in a written contract as to avoid the agreement so far as it affects those who do not assent to such alteration, it must appear to have been made by a party to the instrument, and it must have the effect to change the contract in a material particular. It is well settled that an alteration made by one not a party to the contract, and without the privity of any of the parties thereto, is not material, and will not affect the liabilities of those who are bound by it: *Rees v. Overbaugh*, 6 Cow. 746; *Lubbering v. Kolbrecher*, 22 Mo. 596; *Bigelow v. Stilphen*, 35 Vt. 521; *Bellows v. Weeks*, 41 Id. 590; *Lee v. Alexander*, 9 B. Mon. 25; *Nichols v. Johnson*, 10 Conn. 193; *Boyd v. McConnell*, 10 Humph. 68; *Hunt v. Gray*, 35 N. J. 227; S. C., 10 Am. Rep. 232; *Ford v. Ford*, 17 Pick. 418. Any interlineation, erasure or addition made in the instrument by a stranger, is not regarded as an "alteration" properly speaking, but is termed a "spoliation:" 1 Greenleaf Ev. sec. 566; *Bridges v. Winters*, 42 Miss. 135; S. C., 2 Am. Rep. 598. It does not affect the contract, but merely mutilates the evidence of it. And even if the person making the interlineation, etc., is an agent of one of the parties, unless he had express or implied authority for the act, he will be regarded as a stranger: *Collins v. Makepeace*, 13 Ind. 448; *Hunt v. Gray*, 35 N. J. 227; S. C., 10 Am. Rep. 232; *Bigelow v. Stilphen*, 35 Vt. 521; *Terry v. Hazlewood*, 1 Duv. (Ky.) 109. The learned editor of the American Reports refers to *Morrison v. Welty*, 18 Md. 169, as an exceptional case on this point, holding that where the wife of the payee of certain notes, without his knowledge or consent, made an alteration therein before they came to his possession, the notes were avoided, and regards this as "a violent stretch of the doctrine of agency." The case, however, does not seem to go that length. The point as to the authority of the wife to make the alteration was indeed discussed, but the judges expressly waived giving any opinion upon it, and put their decision upon another ground. In fact the court seemed rather to lean against the idea that the alteration avoided the notes, as we gather from the following expression in the opinion: "In the argument of the case it was contended with some force and show of authority, that the alteration made as assumed in the plaintiff's prayers (for instructions) should be considered as a mischief done by a stranger, and without effect upon his right to recover upon the notes. Waiving the consideration of that point, we think the effect of the change should be limited to the notes alone, and that at most it could only destroy them as binding obligations from the defendant to the plaintiff, without impairing his right to recover the original debt."

But if the alteration is made by a party it does not seem to be material whether the obligee or payee of the contract is privy to such alteration or not. In the following cases the alteration seems to have been made by a co-obligor before delivery to the payee and without his knowledge or consent, and yet it was held to discharge another promisor who did not assent to it.

*Goodman v. Eastman*, 4 N. H. 455; *Wood v. Steele*, 6 Wall. 80; *Britton v. Dierker*, 46 Mo. 591; S. C., 2 Am. Rep. 553; *Lisle v. Roberts*, 18 B. Mon. 528; *Blakey v. Johnson*, 13 Bush, 177; *Draper v. Wood*, 112 Mass. 315; S. C., 17 Am. Rep. 92; *Greenfield Bank v. Stowell*, 123 Mass. 196. The principal case is a leading authority on this point and is cited as such in nearly all the decisions above-mentioned. It is contended, however, in the note to *Draper v. Wood*, 17 Am. Rep. 99, that the doctrine of these cases in this particular, is a departure from sound and established principles. The editor says: "The general rule undoubtedly is that an alteration to avoid an instrument must be made by one claiming a benefit under it. A joint promisor or a maker is not such a one, and it is an extension of the rule to allow him to defeat the instrument without the fault of any one claiming under it. There is nothing in the authorities further than we have given above, against treating an alteration by a maker as a spoliation, and as was said in *Hunt v. Gray*, *supra*: 'The injustice of cancelling a written contract, without fault in the party holding it is so flagrant that it should require the strongest reasons for the law to inflict it.'" Still the decisions holding that an alteration by a promisor or maker of a note without the knowledge of the payee, avoids the note as to another promisor not assenting to it, seem to be clearly within the reason of the general rule. Such an alteration destroys the identity of the contract and to hold a promisor who had no knowledge of it, and who did not consent to it, bound by it, would be to enforce against him a contract which he never made; and on the other hand to permit the payee who has received the altered paper without a knowledge of the alteration to enforce the contract in its original form, would be to give him the benefit of a contract which he never made. The foundation of every contract is a presumed *aggregatio mentium*, a mutual consent between the parties to the same terms and stipulations. This element is wanting in the case supposed. The promisor never assented to the contract in its altered form, and the promisee never assented to it as it originally was. Hence, there is no "agreement of minds," and, therefore, no contract between them. Take the illustration given in *Gardner v. Walsh*, 5 El. & Bl. 82, of a note for one hundred pounds changed to one for fifty pounds, and let it be supposed that this alteration was made by one of two promisors before delivery without the knowledge of the payee and of the other promisor. The innocent promisor never executed the fifty-pound note, and therefore that ought not to bind him; and the payee never accepted the one hundred-pound note, and therefore he ought not to collect that. It is to be noted that the only case where the alteration could be made by a maker or promisor without the payee's knowledge or consent, or at least without culpable laches on his part, would be where it was made before delivery.

That the alteration must change the contract in some essential particular in order to be material and to invalidate the contract is also well settled. The following alterations have been held material. The addition of new sureties without the consent of the original surety: *Gardner v. Walsh*, 5 El. & Bl. 82; *Bowers v. Briggs*, 20 Ind. 139; *McVean v. Scott*, 46 Barb. 379; but the addition of a surety without the knowledge or consent of the principal, does not release the principal; for his liability is not affected, and his contract is not changed thereby: *Miller v. Finley*, 26 Mich. 250; and for a like reason the addition of a new maker to a several note was held not to vitiate it in *Brownell v. Winnie*, 29 N. Y. 400; *contra*, *Wallace v. Jewell*, 21 Ohio St. 163; S. C., 8 Am. Rep. 48; so the subscription of additional names after negotiation will not affect prior parties: *McCaughy v. Smith*, 27 N. Y. 39; *Ston*

v. *White*, 8 Me. 589; *Montgomery R. R. Co. v. Hurst*, 9 Ala. 513. So erasing the name of a surety is a material alteration: *McCramer v. Thompson*, 21 Iowa, 244; inserting or erasing the words "order" or "bearer:" *Booth v. Powers*, 56 N. Y. 22; *Morehead v. Parkersburg National Bank*, 5 W. Va. 74; S. C., 13 Am. Rep. 636; *Johanson v. Bank of U. S.*, 2 B. Mon. 310; *Scott v. Walker*, Dudley, Ga. 243. Changing name of payee: *Broughton v. Fuller*, 9 Vt. 373; *Stoddard v. Penniman*, 108 Mass. 366. Altering the amount: *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Greenfield Bank v. Stowell*, 123 Mass. 196; S. C., 25 Am. Rep. 67; *Woolfolk v. Bank of America*, 10 Bush, 504. Changing date, *Stephens v. Graham*, 7 Serg. and R. 505, post; *Britton v. Dierker*, 46 Mo. 591; S. C., 2 Am. Rep. 553; *Mitchell v. Ringgold*, 5 Am. Dec. 433; *Wood v. Steele*, 6 Wall. 80. Contra, *Parry v. Nicholson*, 13 M. & W. 778; denied in *Hirschman v. Budd*, L. R. 8 Exch. 171. Inserting consideration: *Loce v. Argrove*, 30 Ga. 129. Adding interest: *Fulmer v. Seitz*, 68 Pa. St. 237; S. C., 8 Am. Rep. 172; *Neff v. Horner*, 63 Id. 327; S. C., 3 Am. Rep. 565; *McGrath v. Clark*, 56 N. Y. 34; S. C., 15 Am. Rep. 372; *Holmes v. Trumper*, 22 Mich. 427; S. C., 7 Am. Rep. 661; *Locknave v. Emerson*, 11 Bush, 69. Changing or adding place of payment: *White v. Hass*, 32 Ala. 430; *Nazro v. Fuller*, 24 Wend. 374; *Whitesides v. Northern Bank of Kentucky*, 10 Bush, 501. Other cases of material alterations will be found cited in the note to *Draper v. Wood*, 17 Am. Rep. 103; and see *Homer v. Wallis*, 6 Am. Dec. 109.

IMMATERIAL ALTERATIONS are such merely verbal changes as do not vary the contract in any essential particular, as by the correction of obvious mistakes, or by inserting words which simply express the meaning of the instrument to be what the law would imply it to be without such words. The following have been held to be of that kind: Inserting the words "on demand" in a note in which no time of payment is specified, for it is payable on demand without those words: *Aldous v. Cornwell*, L. R. 3 Q. B. 573; correcting the figures in the margin to correspond with the body of the note: *Woolfolk v. Bank of America*, 10 Bush, 504; *Smith v. Smith*, 1 R. I. 396; or changing the words in the body to correspond with the marginal figures where the latter are correct and the mistake is accidental: *Clute v. Small*, 17 Wend. 237; correcting a date, as where a note was dated "1868," by mistake, the true date being "1869:" *Duber v. Franz*, 7 Bush, 273; S. C., 3 Am. Rep. 314. In general it is held that where the correction does not alter the legal tenor and effect of the instrument, or affect the liability of a party, it will be considered an immaterial alteration. Thus, where a maker, after indorsement added, "payable before maturity, and interest on unexpired term, refunded, if so elect," it was held the indorser was not discharged: *Herrick v. Baldwin*, 17 Minn. 209.

FILLING BLANKS.—The filling of blanks in a note or other instrument may vitiate it as to some parties, when the blank is filled contrary to the intention of the parties; but an alteration or addition of this character ought not to be so strictly regarded, since one who thus leaves a blank in an instrument on which he is liable, is guilty of negligence, if he permits it to pass from him into the hands of another who may be presumed to have an authority to fill up such blanks. Thus in *Redlich v. Doll*, 54 N. Y. 234, the defendant made his promissory note payable to himself and indorsed it. No place of payment was inserted, there being a blank after the word "at." The defendant delivered the note to a party, upon the general agreement that it should not be negotiated or stamped, and intending that it should operate simply as a receipt. This party subsequently stamped the note, and inserted

a place of payment in the blank and negotiated it. It was held that the defendant was liable on the note to a *bona fide* holder for value. In *Garrard v. Hadden*, 67 Pa. St. 82; S. C., 5 Am. Rep. 412; the maker signed a printed note, in the blank of which was written "one hundred," leaving a blank space between that and "dollars," which was in print. This, after delivery, was filled with "fifty." It was held that he was liable for the amount on the face of the note to a *bona fide* holder for value, upon the principle that if one, by his acts, or silence, or negligence, misleads another, or effects a transaction whereby an innocent party suffers, the blamable party should bear the loss. Substantially the same ground, and on like principles, is taken in a recent case in Kentucky: *Blakey v. Johnson*, 13 Bush, 197.

In *Holmes v. Trumper*, 22 Mich. 427; S. C., 7 Am. Rep. 661; the payee of a promissory note drawn upon a printed form, and without the knowledge or consent of the maker, added after its delivery the words "ten per cent;" in the blank after "interest at." It was held that the note was void as to the maker in the hands of a *bona fide* holder, before maturity. But in this case the court put the decision on the ground that there was not really a blank to be filled, according to any intention of the parties; and so treated the alteration as a forgery; and thus distinguished the case from *Vischer v. Webster*, 8 Cal. 109, and *Fisher v. Dennis*, 6 Id. 577. The court say: "We think the courts have gone quite far enough in sustaining instruments executed in blank, and the implied authority to fill them up, and we are not disposed to take a step in advance in that direction." In this case the court assumed the general rule that if a blank was left, there was a presumption of authority to fill it up, and thus acknowledged the principles on which the decisions are based, holding a party liable to a *bona fide* holder, when the blank was filled up after delivery: *Rainbolt v. Eddy*, 34 Iowa, 440; *Bank of Commonwealth v. McChord*, 4 Dana, 119; *Van Duser v. Howe*, 21 N. Y. 531.

While this presumption exists, it must, however, be often a question of fact whether it was understood that the blank should be filled up; for where the filling it up would alter the legal character or effect of the instrument, the presumption would then be too violent: *Luellan v. Hare*, 32 Ind. 211. In *Abbott v. Rose*, 62 Me. 194, an action by a *bona fide* holder of a promissory note against the maker, the defendant alleged that the note was a forgery, and his evidence tended to show that the instrument when delivered contained blanks unfilled, which had been afterwards fraudulently filled. It was held that it was for the jury to determine whether the instrument was delivered as an incomplete paper with blanks to be filled, and that if it was so delivered for any purpose, the person receiving it had implied authority to fill the blanks, and the maker would be liable thereon to a holder in good faith. Here, the instrument, if forged, was invalid, no matter into whose hands it came; and it was, of course, a proper question of fact to determine whether it was so forged; but if the instrument was valid in the first instance, the court, it is seen, assumed the rule that there was an implied authority to fill up blanks.

This question was recently considered in *Greenfield Bank v. Stowell*, 123 Mass. 196, where there is an able examination of the authorities. Here a blank having been left before the word "sixty-seven," it was filled up by prefixing "four hundred and;" so the note purported to be given for four hundred and sixty-seven dollars. It was held that the note was void even in the hands of a *bona fide* holder for value. The court assumes that where a person indorses a blank form of note, and delivers it with the intention that the blank should be filled, he thereby makes the person to whom he delivers it his agent, and is responsible for whatever date, sum or time of payment he

may insert, to a *bona fide* indorsee. The point then turns upon the "intention," and this must necessarily be a question of fact, although there are cases already noticed in New York and Pennsylvania, which hold that a person who permits negotiable paper to pass from his hands, with blanks unfilled, will be held liable to a *bona fide* holder, after the blanks are filled, no matter what the intention was, on the ground of his negligence contributing to give validity to the instrument so filled out.

In *Redick v. Doll*, 54 N. Y. 234, the court take strong ground on this position, saying: "If a note be obtained from a maker by fraud, even if the fraud amount to a felony, under the statute against false pretences, if it be made for one purpose, and used by the holder for another, if it be delivered in blank, with an agreement that the blank shall be filled in one way, and it be filled in another, in all these cases the maker is liable to a *bona fide* holder for value. The maker, rather than such holder, must suffer from his negligence or misplaced confidence." It is thus seen, that our courts do not agree as to one's liability when blanks are filled up, in a note or other instrument, after it passes from his hands; some holding him liable on the ground of negligence, in the nature of an estoppel, and others, not going so far, but seeking to determine, as a matter of fact what the "intention" was.

**TIME OF ALTERATION.**—There is a presumption of fact that an alteration was made, after the execution, but it will be generally a question for the jury to determine, whether the alteration was made before or after the execution: *Paine v. Edsall*, 19 Pa. St. 180; *Fontaine v. Gunter*, 31 Ala. 264; *White v. Han*, 32 Id. 432; *Orcutt v. White*, 36 Miss. 455; *Crabtree v. Clark*, 20 Me. 337; *Hill v. Barnes*, 11 N. H. 397; *Heffelfinger v. Shultz*, 16 Serg. & R. 44; *Boyley v. Taylor*, 11 Conn. 531; *McCormick v. Fittonmorris*, 39 Mo. 34; *Sirrine v. Briggs*, 31 Mich. 443. Greenleaf on Evid. sec. 564, first volume, says: "If, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious, and this suspicion the party claiming under it, is ordinarily held bound to remove. \* \* \* But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence."

## SLEE v. BLOOM.

[19 JOHNSON, 458.]

**SURRENDER OF CORPORATE RIGHTS.**—A corporation may be dissolved by a surrender of its corporate rights. And if a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights.

**DEB.—STOCKHOLDERS' INDIVIDUAL LIABILITY.**—Pursuant to the act to establish corporations for manufacturing purposes, the defendants, in December, 1814, became a corporation, to expire in twenty years. Subsequent to December, 1817, there was no meeting of the trustees, nor any business done by the corporation; and in February, 1818, the property of the

corporation, real and personal, was sold at sheriff's sale. It was held, in an action brought in April, 1819, by a creditor of the corporation, against the stockholders, to charge them individually for the debt of the corporation, in proportion to their relative shares of stock, that they were liable, the corporation having been dissolved by reason of its ceasing to act as such, and by reason of the sale of all its property.

**RESOLUTION PERMITTING STOCKHOLDER TO FORFEIT STOCK.**—A resolution of a corporation, permitting the stockholders, on payment of thirty per cent. on their shares, to forfeit their stock, is void as against creditors. Where a creditor, who was a trustee of the corporation, openly protested against such resolution, though he accepted money raised thereby, and was present at a subsequent meeting, and assented to the application of the money, it was held that such acts did not amount to a ratification of the resolution.

**RELEASING STOCKHOLDERS FROM FUTURE ASSESSMENTS.**—A resolution discharging from future assessments any stockholder paying fifty per cent. on his shares, is valid as to consenting creditors, and will protect such stockholders as complied with its terms before the dissolution of the corporation.

**APPEAL** from the court of chancery. The bill was filed April 24, 1819. Appellant, being possessed of a certain tract of land on Wappinger creek, and a cotton manufactory thereon, applied to Bloom and others, proposing to them to form a corporation, to be known as "The Dutchess Cotton Manufactory," the stock of which should be divided into six hundred shares of one hundred dollars each. The proposition was accepted, and the articles of incorporation were filed on the twelfth of December, 1814, pursuant to the act passed on the twenty-second of March, 1811, relative to incorporations for manufacturing purposes. The plaintiff was chosen president. Pursuant to agreement, the treasurer and secretary conferred with the plaintiff concerning the price of the factory, etc., and reported at a meeting of the trustees that the same could be purchased for thirty thousand nine hundred and twelve dollars. The report was unanimously accepted, and a subscription-book opened, by which the subscribers promised to pay one hundred dollars for every share set opposite their names. The bill then set forth the number of shares subscribed for by each of the defendants.

The plaintiff executed a deed to the corporation, of the factory, etc., in March, 1815, the plaintiff deducting from the purchase-price the value of the stock subscribed for by him. Between September, 1815, and June, 1816, there were three calls made upon the shares of the stock; and the stockholders generally neglecting to make the payment of twenty-five dollars levied on each share, in June, 1816, suits were directed to be made. In October, 1816, it was resolved, at a meeting of the

trustees, to be inexpedient to continue the factory in operation, and the plaintiff, who was superintendent, was directed to shut it up, and discharge the workmen. In November, 1816, a committee previously appointed to liquidate the account of the appellant, reported a balance in his favor of twenty-four thousand four hundred and forty-three dollars and thirty-five cents; and a bond for the balance, executed and signed by the president, secretary and treasurer, and sealed with the corporate seal, was delivered to plaintiff.

Prior to this transaction, plaintiff had borrowed ten thousand dollars from the Manhattan Bank, giving his note therefor, with Bloom and other stockholders as indorsers. This sum plaintiff had expended on behalf of the corporation, and it was considered in estimating the balance due him. This note the indorsers were obliged to assume at maturity, and to indemnify them plaintiff gave them a bond and warrant of attorney, on which they entered up judgment in June, 1816. Plaintiff thereupon brought an action against the corporation on the bond given to him, and obtained judgment in May, 1817, with a stay of execution until October. In August, 1817, it was resolved at a meeting of the trustees, that any person might transfer his stock, and be discharged from any future calls, on paying up the calls of fifty per cent. which had then been made, and costs, and that no proceedings should be had to enforce the payment of further calls, other than by way of forfeiture. On the third of November, 1817, it was further resolved to lease the factory for three years, and that the stockholders might forfeit their stock to the company by paying up thirty per cent. on their shares by December first following, which resolution plaintiff opposed. The most of the stockholders availed themselves of this resolution and abandoned the factory, though they had not given up their scrip. No election of trustees was made since April, 1817, and the stockholders had come to a resolution never to make another election, and to abandon the factory and corporation altogether. In November, 1817, plaintiff having learned that Bloom and the other indorsers on the ten thousand dollar note had taken out a *fieri facias* on their judgment against him, caused a *fieri facias* on his judgment to be levied upon the factory, etc., as property of the corporation, by virtue of which it was sold at sheriff's sale in February, 1818, and purchased by G. B. Evertson for four hundred and eighty-seven dollars and fifty cents. In January, 1818, by advice of the corporation's attorney, the funds then in the treasury, four thousand one hun-

dred and five dollars and fifty-nine cents, were applied in discharge of the ten thousand dollar note held by the Manhattan bank, and to prevent a sacrifice of his property to pay the balance, plaintiff procured Evertson to give his note therefor to the bank, which then gave up the ten thousand dollar note and discharged the indorsers.

The bill prayed for a discovery, and that the individual stockholders be decreed to be liable on the corporation debt, in proportion to their respective shares, and for relief generally.

Bloom and several other stockholders filed answers, alleging that they were induced to enter into the corporation through the urgent solicitations, artful assurances and exaggerated statement of the plaintiff as to profits, etc.; that the purchase of the property by Evertson was for the benefit of the plaintiff, who was the real owner; and that plaintiff had prosecuted to judgment his action on the bond in order to regain the factory and draw from the stockholders their subscriptions for the payment of his debts. Other stockholders answered, claiming the protection of the resolutions of the twelfth of August and third of November.

Chancellor Kent dismissed the bill on the ground that the corporation had not been dissolved, and that if it had been dissolved, the bill was not binding as to stockholders who had taken advantage of the resolutions of August twelfth and November third.

*P. Ruggles and T. A. Emmet, for the appellant.*

*T. I. Oakley, contra.*

SPENCER, C. J. (after stating the facts in the case): With the most profound and undissembled respect for the chancellor, I am constrained to differ from the opinion held by him, that this corporation is not dissolved.

The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes, was in effect to facilitate the formation of partnerships, without the risks ordinarily attending them and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating and becoming incorporated, for the purposes held out in the act, are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community. In this respect, incorporations under the statute differ from corporations to whom some exclusive or peculiar privileges are



granted. The only advantages of an incorporation under the statute over partnerships, and the only substantial difference between them, consists in a capacity to manage the affairs of the institution, by a few and select agents, and by an exoneration from any responsibility beyond the amount of the individual subscriptions.

In coming to the conclusion that the corporation in this case is dissolved, I lay out of the case everything of misuser or non-user, excepting the influence which the fact of non-user may have as evidence, connected with other facts, to show the renunciation of the corporate rights. Upon the authorities, and for the reasons given by the chancellor, misuser or non-user cannot be relied on as a substantive and specific ground of a dissolution. The ground on which I place my opinion, that the corporation is dissolved, is, that they have done and suffered to be done, acts equivalent to a direct surrender. The chancellor concedes, and it does not, in my judgment, admit of a doubt, that a corporation may be dissolved by a surrender of all their corporate rights.

In 2 Kyd on Corp. 467, the rational and true rule is laid down; he says: "The rule adopted in all the cases which have occurred on this question, seems to have been this, that where the effect of the surrender is to destroy the end for which the corporation, or the corporate capacity was instituted, the corporation, or the corporate capacity, is itself destroyed;" and we have the high authority of Lord Coke to the same effect. He says, if there be a warden of a chapel, and the chapel and all the possessions be aliened, he ceases to be a corporation, because he cannot be warden of nothing; but if the body of a prebend be a manor and no more, and the manor be recovered from the prebendary, by title paramount, yet his corporate capacity remains, because he has *stallum in choro, et vocem in capitulo*, and he is prebendary, although he has no possessions. Thus, according to Lord Coke, a recovery by title paramount, would have produced an extinction of the corporation, had it reached all the rights and powers of the corporation, but inasmuch as there were rights unaffected by the recovery, it did not work a dissolution. Suffering an act to be done which destroys the end and object for which the corporation was instituted, must be regarded as equivalent to the doing an act which produces the very same consequences. A surrender is an act *in pais*; it can, therefore, be no objection in this case, that the acts which have dissolved the corporation, are acts *in pais*.

This bill was not filed until the twenty-fourth of April, 1819. In February, 1818, all the estate, real and personal, of the corporation, was sold under an execution, and, as has already been stated, the corporation has totally ceased from acting since December, 1817. The bill charges, substantially, that the corporation is dissolved, and not one of the respondents asserts, that it does exist, or that there is the remotest idea of resuscitating it. Here is, then, a corporation possessed of nothing, abandoning the end and object of their institution, without pretending that they ever hope or expect to resume their functions, and, it may be added, all the corporators either admit the dissolution of the corporation (I speak of those who have suffered the bill to be taken *pro confesso*), or deny that they are corporators. Thus, presenting the phenomenon of a corporation without corporators, a nominal, inert body, pretending to have life and existence. Such an anomaly cannot be recognized. The argument is, that being incorporated for twenty years, there exists a corporate capacity during that period, and that although all the functions of the corporation have ceased, yet they may be resumed. The second section of the act provides that as soon as the certificate shall be filed, the persons who shall have signed and acknowledged the same, and their successors shall, for the term of twenty years next after, be a body politic and corporate, in fact, and in name, etc. The legislature never meant, nor does the act authorize the conclusion, that the corporation should remain and continue during all that period, *volens volens*. It was implied, that during that time they should do nothing to forfeit their rights, nor surrender them back, or do any act tantamount thereto. The act prolongs the corporation for twenty years, subject to all the incidents attending corporations, and I have endeavored to show that one of the incidents is an extinction of the corporation, if it does what is equivalent to a surrender.

I doubt, extremely, whether the capacity to resume the functions of the corporation, does, in fact, exist; but it is not necessary to decide that point. I consider it merely as a matter of speculation, thrown out without any practical reference to the cause, as a stumbling block to the attainment of justice between the parties. For all the substantial purposes of justice, and in effect, the corporation is dissolved. In the case of the *King v. Pasmore*, 3 T. R. 244, Justice Ashurst says, "as to the contrariety of opinions in the books on this subject, I shall not attempt to reconcile them, but we ought to lean to that side which

is supported by reason. Possibly the seeming contrariety may have been, in some degree, occasioned by the equivocal use of the term 'dissolved;' as far as concerns the power of the crown to grant a new charter, I think the corporation was dissolved. As to some particular purposes which do not relate to the powers of government, but to personal privileges which are annexed to the persons of the remaining individuals, such as rights of common, etc., it may be said not to be dissolved, at least till the crown interposes." Justice Grose, in the same case, said: "Now, in point of good sense, when the purposes for which a corporation was created can no longer be answered, there is no reason why it should not be considered to be so far dissolved, as that the crown may raise there a new corporation," etc.

The doctrine urged by the respondent's counsel is, that this corporation must endure for twenty years, unless it is judically declared to be dissolved, for misuser or non-user; and we perceive, by some of the cases cited by the chancellor, that even where there had been an omission to elect burgesses for twenty-two years, doubts were entertained whether there had been such a non-user as vacated the charter. It is observable, that the appellant has no control over the process or remedy to dissolve this corporation for non-user. The people of the state, through their law-officer, can only institute such proceedings. Then as regards the appellant, if we are to consider this corporation in existence, he must patiently await the lapse of twenty years, before he can have any remedy. I say, in the words of Lord Mansfield, 3 Burr. 870: "Without an express authority, so strong as not to be gotten over, we ought not to determine a case so much against reason."

In point of good sense, this corporation was dissolved within the meaning and intent of the act, as regards creditors, when it ceased to own any property, real or personal, and when it ceased for such a space of time, from doing any one act manifesting an intention to resume their corporate functions. The end, being and design of the corporation, were completely determined; and if even it had the capacity to reorganize and reinvigorate itself, the case has happened, when as relates to its creditors, it is dissolved. If I am right, thus far, then, by the seventh section of the statute, the persons composing the company, at the time of its dissolution, are individually responsible, to the extent of their respective shares, for the debts then due and owing by the company. With respect to the period of

the dissolution, it appears to me, that we may safely say it happened on the first of February, 1818, when all the property of the company was sold; for, since that time, no corporate act has been done.

The next question is, how far the resolution of the third of November, 1817, discharged those of the respondents who have complied with its terms, from any further liability to the appellant? That resolution gives the stockholders the privilege of forfeiting their stock by paying thirty per cent. with costs, on or before the first of December following. It appears in the body of the resolution that the appellant protested against it, as it would not pay the debts of the factory. The evidence places it beyond all doubt, that the debt due to the appellant, who is the only creditor of the company, will be partially paid only, if that resolution has the effect intended by it. A large balance will be irrecoverably lost.

Now could the trustees pass a by-law having effect to deprive a creditor of the company of his only means of satisfaction, by a resort to the stockholders ratably, until his debt was paid? I answer without hesitation that such a by-law or resolution is entirely inoperative. It is an attempt to get rid of a responsibility which the law and common justice imposed on them; the trustees who assented to this resolution must have known at the time, from the report of their committees and the state of their affairs, that thirty per cent. was inadequate to pay the appellant. The trustees had antecedently made calls to the amount of fifty per cent.; and on the eighteenth of August, 1817, the appellant had assented to a resolution that on payment of all the arrears of calls (which, in fact, then amounted to fifty per cent.), with costs, the prosecutions should cease, and no proceeding should be had against any subscriber, other than by way of forfeiture. These calls had been made expressly to satisfy the appellant's debt; and on the third of November, we find the same trustees, who were themselves interested in the question, discharging the stockholders, on payment of thirty per cent., conscious at the time that the appellant must go unpaid forever. I do not stop to inquire by what means this resolution was obtained; I pronounce it to be against the fundamental principles of law and equity, legally fraudulent, and therefore void and inoperative.

It is argued that the appellant never gave public notice of his dissent to the resolution; that the thirty per cent. had been paid by several of the respondents, on the faith of the resolution,

which was published in the papers; and that the silence of the appellant ought to preclude him from now objecting to the resolution. There are several answers to this objection. I agree with the appellant's counsel, that those who paid ought to have ascertained the fact that the appellant assented to a measure that was to deprive him of a great part of his debt; but how are these respondents prejudiced by the act of paying the thirty per cent.? For if they are not injured in their rights by the payment, they cannot object to the want of notice. Do they mean to say they would not have paid had they known that the appellant objected to the resolution? Then they would have been responsible as stockholders under the provisions of the act. The payment goes to diminish the amount which they then would have been compelled to pay. So that the payment does not in the least prejudice them. Whether there was notice or no notice, therefore, their situations are not altered. But as to the fact of notice, the appellant's dissent was embodied in the resolution, and none of the respondents could have been ignorant of it if they saw the resolution. All the stockholders lived in and near Poughkeepsie; many of them had personal interviews with the trustees, and it is inconceivable that they should have been ignorant of so important a fact. Again; the trustees were the agents of the stockholders, and it is a fixed principle that notice to an agent is notice to the principal.

The next point is whether the appellant has ratified the resolution of the third of November, 1817, by his acceptance of money from the treasurer of the company, received under the resolution, or rather by his being present at the meeting of the trustees on the first of December, 1817, when it was resolved that the attorney of the company should apply the funds he had in hand to the credit of the note given by Bloom and others to the Manhattan bank, in consequence of their indorsing the appellant's note of ten thousand dollars. It has been said that this resolution was passed on the day the moneys were payable under the resolution of the third of November, and that it was passed with a view to these very funds; the appellant being present and concurring in the resolution, and observing that payment on that note was as good to him as payment by the members on their stock. This has been pronounced a strong ratification of the resolution, and that as the appellant availed himself of the fruits of it, he could not in good faith now object, not having dissented from the application of the money. It has been also said that he should have made his dissent as public as

the resolution, and have abstained from particular and pointed participation in its results. His concurrence in a resolution of the twenty-sixth of December, 1817, directing suits to be brought against such persons as had not complied with the resolution of the third of November, has also been considered a conclusive ratification of that resolution.

It is with the utmost deference to the learned chancellor that I dissent from this reasoning. The appellant had in vain protested against the resolution of the third of November. It would have been a work of supererogation to have repeated his protest and dissent to resolutions growing out of and bottomed on that resolution. Besides, he was not dealing with the stockholders, and his not dissenting from the subsequent resolutions would have no effect upon their conduct. Silence, unless when a person is bound to speak, and when silence would mislead, can never have the effect attributed to the appellant's conduct. It would, in my judgment, be carrying the principle of ratification to its utmost limits to say that the appellant, after his vehement and solemn protest against the original resolution, ceased his opposition when he saw the trustees following up that resolution. I cannot consider the appellant's negative conduct on the occasions referred to as a ratification of the unjust resolution of the third of November.

The next point is as to the effect of the resolution of the eighteenth of August, 1817, as to those who complied with its terms, and as to such of the stockholders who did not comply with them. First, as to those who did comply with its terms, the appellant being present and consenting to that resolution, I concur in opinion with the chancellor, that he was bound. It was in the nature of a contract, and was free from any objection of compromising the rights of third persons and creditors. Two of the respondents only have paid the fifty per cent., namely, Martin Hoffman and James Reynolds. Hoffman paid the fifty per cent. on the seventeenth of January, 1818, and James Reynolds paid the fifty per cent. on the fifteenth of January, 1818. There had been a lapse of some time between the payments and the passing of the resolution, but the payments were made before the sale of the factory on execution and the resolution had not been rescinded, nor had these respondents been forewarned not to make the payments.

Under these circumstances, I incline to the opinion that Martin Hoffman and James Reynolds cannot be considered any further responsible. But I do not think the other respondents

can take any benefit under that resolution. They have never complied with it; the appellant's assent was undoubtedly given with the view of immediately realizing the amount which a compliance with that resolution would have produced. To say that he is now bound by an offer made under a different state of things, after a total wreck of all the property of the company in which the appellant was so largely interested, would be unreasonable and inequitable. The offer was made, and the respondents, except Hoffman and Reynolds, refused to comply with it. How, then, can the respondents, after such a lapse of time, claim the benefit of this offer as a contract, when they rejected the offer? The appellant might have very good reasons for making a large sacrifice upon the debt due him. He was willing to do so, upon prompt payment of the fifty per cent. No court has a right to say to him that he shall adhere to his proposition, which was rejected by the respondents. There would be no reciprocity in this, and I am entirely satisfied that we cannot, and ought not, to consider it as an existing contract.

It has been urged that the appellant was guilty of fraudulent representations as to the value of the property he sold, and the profitable nature of the business he was carrying on, so that the respondents ought not, in equity, to be bound by their subscriptions. The charge is so destitute of foundation that it does not deserve a serious refutation. The facts show that there were much examination and deliberation on the part of the company before the purchase was concluded; and although subsequent events proved that the appellant miscalculated as to profits, this was to be attributed to a change in political events, and not to any fraudulent design to deceive or misrepresent.

It is, also, contended that such of the respondents as subscribed to the stock of the company, under a promise by the appellant that he would take it off their hands, must be considered, at their election, as holding the same as trustees for him, and are, therefore, not bound to make contribution. It cannot be doubted, that if any of the respondents have become subscribers in behalf of the appellant, and have merely lent their names to accommodate him, without intending to have any interest in the concern, they ought not to be holden to contribution. On the other hand, if any of them have subscribed, under a general assurance from the appellant that he would take the stock off their hands, if they should require it, and

they have gone on acting as stockholders until the affairs of the company have become bad, and then require a fulfillment of the assurance, they can have no right, either in law or in equity, to an exoneration from contribution.

It will be at once seen that there would be no mutuality or reciprocity in such a bargain. If the concern was profitable, then they would hold upon their shares; if unprofitable, or disastrous, then they would throw the loss upon the appellant. They would thus make him run the risk of all the losses, while they took the chance of all the profits. There is one decisive test. Those of the stockholders who paid the calls out of their own pockets are entirely precluded from setting up any such promise or assurance; and with regard to them we must say that they are concluded. They have evinced by their acts that they hold the stock in their own rights, and not as trustees for the appellant. As to them we are bound to consider the appellant's assurances as merely denoting his confidence in the success of the institution. These observations apply to George Bloom, Albert Cocks, Derick B. Stockholm, Leonard Davis, John Nelson, Abiel G. Thompson, Elizabeth Tappen, Daniel Hoffman and Benjamin H. Conklin, and to such of the respondents as have suffered the bill to be taken *pro confesso*, and also to Peter Ackerman and Catharine R. Livingston, who have entered into a stipulation that their cases shall abide the decision with respect to others in the same condition as themselves.

Having already expressed an opinion that Martin Hoffman and James Reynolds are exonerated in consequence of their compliance with the resolution of the eighteenth of August, 1817, the particular cases of John E. Pells and Daniel Coolidge require to be considered. Pells was not an original subscriber. He purchased ten shares of Joseph H. Cunningham. These shares at the time of the purchase had been paid in full. He received scrip for them, with an indorsement by the treasurer that they were paid in full. I can perceive no principle on which he can be charged. If even there could be any doubt in such a case, with respect to creditors who have no concern in the institution, there can be none in this case, for the appellant has been benefited by this very payment. Pells is, therefore, entitled to be dismissed from the cause.

With respect to Daniel Coolidge, he asserts and proves that he subscribed for twenty shares under an assurance from the appellant that he should be at liberty to pay for his stock or not, as he chose, and that the appellant would at any time



take it back if he should not be desirous of keeping it. Coolidge admits that he paid five dollars on each share under the call of the seventeenth of March, 1815, and it appears that he was appointed and acted as secretary of the company. On the first of December, 1817, he made a formal tender of his scrip to the appellant. I can see no difference between this case and those of the respondents who went on paying other calls, and who availed themselves of the resolution of the third of November. The payment by Coolidge, out of his own funds, of the call of the seventeenth of March, 1815, his acting as one of the company, and retaining his stock until the affairs of the company were desperate, manifest a willingness to be a stockholder if the undertaking turned out prosperously, but, if otherwise, not. It has been asserted that Crosby and Cocks are creditors of the appellant and have a set off against him, and that these demands ought to be deducted from the amount which they may be required to pay in this case. It seems to me equitable that such deductions should be made, if their respective demands are susceptible of adjustment before a master; for although the respondents are jointly sued, they are individually and not jointly liable to the appellant.

The respondents' counsel has strenuously insisted that the only responsibility assumed by the subscription was a right, at the election of the subscribers, to forfeit their shares, with all previous payments made thereon, and this opinion is founded on the decision in this court, in the case of *Jenkins v. The Union Turnpike Co.*, 1 Cai. Cas. 86. In a suit by the *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 244 [7 Am. Dec. 459], which was an action on the subscription paper in this case, the supreme court had occasion to review all the cases, and that court entertained no doubt of the liability of the stockholders, in an action brought to enforce the calls. I need not now attempt to support the correctness of that decision, because if the corporation is dissolved and if the resolution of the third of November is void, the respondents were stockholders when the corporation became dissolved, and then the statute expressly renders them liable to creditors, to the amount of their stock. If, however, the corporation was not dissolved, I have no doubt that upon the principles of the case of *Salmon v. The Hamborough Company*, 1 Cas. in Ch. 204, and in 1 Kyd on Corp. 273, the appellant would be entitled to a decree in his favor. I forbear going into that case, for I do not feel that it is necessary. The court intimated, on the argument, that we should not sustain the

question on this appeal, what was the amount due to the appellant from the company, as the chancellor had not considered that point.

The result of my opinion is, that the decree complained of be reversed; that the cause be remitted to the court of chancery with directions to enter a decree declaring all the respondents except Martin Hoffman, James Reynolds, and John E. Pells liable, individually, to the extent of their respective shares of stock in the said company and no further, to pay appellant's debt, but that the payments made by the respondents on their stock, shall be deemed, so far, to have diminished their liability, and, as respects Martin Hoffman, James Reynolds, and John E. Pells, that the bill be dismissed, and that they be paid their costs incurred in the court below.

YATES and VAN NESS, JJ., concurred.

PLATT, J., being related to one of the parties, declined giving any opinion.

WOODWORTH, J., not having heard the argument, gave no opinion.

The rest of the court concurred, except AUSTIN, senator, who dissented.

Decree accordingly.

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This case is instructive, taken in connection with the note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 92, where some of the points arising here are examined.

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## SKINNER v. DAYTON.

[19 JOHNSON, 512.]

**RATIFYING PARTNER'S CONTRACT.**—One partner or member of an association cannot execute a deed or writing under seal so as to bind his copartners without express authority therefor; but such authority may be given by parol. However, if by their subsequent acts, the copartners ratify a contract made without such authority, they will be compelled to contribute ratably to any damages that may have been recovered at law on such contract against the partner executing it.

**PERSONAL LIABILITY OF PARTNER.**—Where a partner undertakes to bind his copartners by an instrument in writing without express authority, he will be personally liable on such contract.

**APPEAL** from the court of chancery. The bill stated that defendants Dayton, Wheeler, W. Raymond, Jr., N. H. Raymond, A. S. Hitchcock, I. Hall, and N. Doane, being desirous

of associating themselves together for the purpose of manufacturing cotton yarn and cloth, on the tenth of April, 1815, adopted and subscribed certain articles called the constitution, declaring, among other things, that the name of the association should be The Granville Cotton Manufacturing Company, and that there should be a president who should be *ex officio* director, and not less than two nor more than four directors and a treasurer. That the president should have power to appoint a general agent whose duty it should be to purchase stock and vend the goods of the company, and, under the particular direction of the president and directors, to transact all business. That each subscriber to the stock should pay ten dollars for each share subscribed, and from time to time pay all assessments levied thereon. That the stock of the company should be divided into twenty shares, of which plaintiff took four and was elected president, and White, Taylor & White, also defendants, took two.

That on the twenty-fifth of April, 1815, an agreement in writing and under seal, was entered into between White, Taylor & White, and the plaintiff, as agent and director of the company, by which W., T. & W., engaged to manufacture and deliver at the factory, frames, spindles, etc., and all necessary apparatus for complete operation, and the plaintiff and W. R., Jr. and A. P. H., engaged in behalf of the company to pay therefor fifteen thousand one hundred and twenty dollars; nine hundred in thirty-five days, and five hundred every thirty days thereafter, until the machinery shall be in full operation, at which time the balance was to be paid. That W., T. & W. knew the constitution of the company, and before the execution of the agreement, they subscribed for two shares, on condition that they should be exempted from all assessments until the machinery was finished and the factory in operation. That on the twenty-seventh of April, 1815, an assessment of fifty dollars was levied, which all the stockholders save Dayton, Hall and Wheeler, refused to pay, and forfeited their shares. That in May following the directors gave notice thereof in writing, dated May 20, 1815, to W., T. & W., and informed them that the contract could not be performed. That plaintiff had been compelled to pay certain sums to Clark and Savage on behalf of the company, and had been sued by W., T. & W. for breach of the contract in which action plaintiff had pleaded that he executed the agreement as agent and director merely, but judgment had been given against him on demur-

rer, of all which his partners had notice. The bill prayed for a discovery, an injunction to the suit at law by W., T. & W., and for general relief.

The answers of W., T. & W., alleged that the contract was with the plaintiff personally, and that by reason of his failure to perform his agreement they were thrown into insolvency. The other defendants alleged that the contract was made without authority.

After testimony taken in the cause the chancellor directed a reference to a master, to find the amount of W., T. & W.'s damages caused by plaintiff's non-execution of his contract, and also decreed that the other defendants were not bound to contribute to the damages so found.

*Henry*, for the appellant.

*Buel, Z. R. Shepherd and Van Vechten, contra.*

PLATT, J., The bill filed by Skinner against the respondents embraced two objects: 1. A liquidation of damages, upon principles of equity, arising out of the contract made by the appellant with White, Taylor & White; and, 2. To compel the other respondents to contribute for the damages to be assessed in favor of White, Taylor & White.

That the appellant is personally liable upon the covenant which he executed, so as to give to White, Taylor & White a remedy against him alone has been decided by the supreme court as well as the court of chancery. The whole subject, however, has never before been presented in all its parts and relations, and in reviewing the decisions at law and in equity, upon the particular points that have been adjudged in relation to this controversy, I am clearly of opinion that the doctrine of *res judicata* has no just application on this appeal. The decision of the supreme court, 18 Johns. 307, pronounced that Reuben Skinner was personally and individually liable upon the covenant executed by him to White, Taylor & White. But it turned merely upon a question of special pleading. It was there decided, on demurrer, that to avoid individual responsibility it was necessary for Skinner to aver and prove not only that he sealed the contract for the directors, etc.; but that he had authority from them for that purpose. It turned upon the technical effect of a seal. For if the associates are considered as partners one of them could not bind his copartners by a seal without special authority; and, admitting that as a partner, the appellant might in this instance have made a contract with-

out seal which would have bound all the associates, yet, as he used a seal, the simple contract as partner was merged in the covenant; and thereby it became, in judgment of law, his own individual contract, unless he could prove that his associates especially authorized him to seal for them. The respondent, Skinner, in that case was allowed to plead *de novo*, and before final judgment was rendered he resorted to the court of chancery, where the whole subject has been developed, and we now have the proofs as well as the pleadings before us. The former appeal to this court was upon a decretal order, which dissolved the injunction for staying the proceedings at law. In reversing that decretal order this court was confined to the allegations in the bill and answer, and the decision on that appeal did not involve the questions now presented.

We are at liberty, therefore, to disregard the *obiter dicta* of the learned members of this court who assigned the reasons for that reversal: "*judex non reddit plus quam quod petens ipse requirit.*" We were not then required to decide as to the rule of damages, nor the right on the part of Skinner to contribution from his associates, nor could we then determine definitely as to the eventual liability of Skinner, because all the defensive allegations in the answer of White, Taylor & White were denied by the replication of Skinner, and the proofs were not then before us. The order of this court for continuing the injunction was a preliminary step for arresting the proceedings at law, until the whole merits should be ascertained from the proofs as well as the pleadings. The condition annexed to that order, that judgment should be confessed and perfected at law, was intended as a provisional security, merely, to be used or modified as the equity of the case should eventually demand; and we have a rightful control over that judgment by perpetual injunction, for the whole or for part, as equity shall require.

As to the validity and binding force of the covenant entered into by Reuben Skinner, as to render him personally and individually responsible, I see no reason to entertain a doubt. Whatever relation he may have stood in with regard to his associates in the manufacturing company, whether as copartner or as agent, he has a right to volunteer his own individual credit and responsibility; but he certainly had no right to contract in that form either for the company or for his co-directors. They had given him no authority to seal for them; and yet he voluntarily undertook to perform that office on their behalf, stating on the face of the instrument that he so executed it for him-

self, and Wm. Raymond, jun., and Abner C. Hitchcock, as directors of The Granville Cotton Manufacturing Company. He thereby virtually represented and affirmed that he had authority from his co-directors to make such a contract for them.

No bad faith is imputable to White, Taylor & White in any part of the whole transaction. They fairly and honestly acquired that security; and when obtained, it was obligatory on Reuben Skinner, and on no other person. He did not bind his principals, because he exceeded the authority which they had given him; and neither law nor equity would tolerate the idea that the covenant thus executed, was to be treated as a nullity. If Skinner did not bind his principals by sealing that contract, it must follow that he bound himself individually. White, Taylor & White were no doubt induced to believe that they had the covenant of all the three directors of the manufacturing company, and when their mistake is discovered, shall it be allowed that Skinner, who led them into that error, shall take advantage of his own wrong, and be held irresponsible? By executing that contract, Skinner neither created any obligation nor gave any right of action against any person but himself. The Granville Manufacturing Company had a right to adopt or disavow the contract, as they pleased; and Skinner had no right to cast upon White, Taylor & White the burthen of proving a subsequent ratification by the company. White, Taylor & White had a right, therefore, to elect to consider and treat it as the personal and individual covenant of Skinner, and they have uniformly done so. Whether the co-directors or the members of the association, subsequently ratified and adopted the contract, so as to render them liable for contribution, is a distinct question, which I shall hereafter examine. But I think it clear that until such ratification, White, Taylor & White had no remedy against them, either in law or in equity. And if at any time personal and individual responsibility attached to Reuben Skinner upon the covenant, White, Taylor & White had a right to rely on his security alone, and to leave him to seek aid or contribution from his associates.

But it is insisted by the counsel for the appellant, that White, Taylor & White have no equitable claim for damages, because they chose to stop in the progress of the work, and have never delivered nor tendered any part of the machinery. This was an executory contract, which could not be altered nor rescinded without the mutual consent of the parties; and I have no doubt that White, Taylor & White might have proceeded, if they

chose, to a completion of the whole contract on their part, and then they would have had a right to recover the whole price according to the contract. But I think the letter of the twentieth of May, and the twenty-fourth of July, 1815, with all the concomitant circumstances of the case, were abundantly sufficient to excuse and dispense with any further performance of the contract on the part of White, Taylor & White. They were notified that the stockholders had refused to pay the assessments, and would "of necessity, have to abandon the business unless some alteration could be made in the contract." White, Taylor & White were under no obligation to alter the contract; and in my judgment they had a right to stop the progress of the work, and to have a liquidation of damages upon equitable principles, as to what had been rightfully done under the contract before the first of August, 1815, when it was mutually abandoned. That White, Taylor & White had subscribed for shares in that association, cannot, I think, vary the construction of their agreement with Skinner, nor affect their rights under it, except it be to render them contributory, if the point of contribution shall be determined against the stockholders.

The next question in order is as to the rule of damages upon the liquidation of the contract. There is great difficulty in prescribing the rule; and there will probably be still greater difficulty in the application of it. According to my view of this question, the master should be directed to ascertain and report, 1. What amount of labor was performed, what amount of materials was procured, and what amount of expenses were actually and *bona fide* incurred by White, Taylor & White, pursuant to the covenant, up to the first day of August, 1815; 2. What amount of profits if any, would have accrued to White, Taylor & White if the contract had been mutually fulfilled by the parties in good faith, and in all its parts; 3. What proportion did the profits, if any, upon the labor, materials, and expenditures, so applied under the contract, up to the first of August, 1815, bear to the estimated profits, if any, on the entire and mutual fulfillment of the contract; and, 4. What was the available amount in value to White, Taylor & White, in fair, open market, on the first day of August, 1815, of all the actual labor, expenses and materials so appropriated and applied by them under the contract up to that day? to the end that White, Taylor & White may be credited with the amount of labor, materials and expenditures found to have been so applied on the first of August, 1815; and also credited for the proportion of profits, if

any, so to be found under the third head of inquiry above stated; and that interest be added to both those items of credit from the first day of August, 1815; and that they be debited with the available amount of labor, expenses, and materials, so found to have been appropriated and supplied by them, under the fourth head of inquiry, together with interest thereon from the first day of August, 1815; and the balance of such account will be the amount of damages to be recovered under the contract.

As White, Taylor & White elected to abandon the further execution of the contract, when that option was tendered to them by the opposite party, I can perceive no equitable grounds for their claim of profits beyond the *pro rata* allowance. Suppose the fair calculation of profits on the entire and successful completion of the whole machinery to be three thousand dollars, as estimated by some of the witnesses, yet it is to be considered that they must have devoted their time, and services, and capital, and credit for nearly a year longer; and during that time they would have been subject to a great variety of risks and unfortunate casualties, from all which they were relieved by the mutual abandonment of the contract. To entitle them to profits on the whole machinery, they must have earned those profits by completing the whole work, which they have not done. It is contended that in fact White, Taylor & White had no option; that the default on the part of Skinner in not paying the two first installments deprived them of the means of prosecuting the work; and that this compulsory abandonment of the contract was the cause of their utter ruin in business and property. These are among the unfortunate consequences which daily occur from the want of punctuality in pecuniary engagements; but neither courts of law nor equity can measure damages by such remote consequences or contingencies. If the money had been punctually paid according to contract, it might perhaps have been profitably used; but it might also have been lost or wasted. The lawful rate of interest is the only standard which we can recognize for damages arising from the non-payment of money upon such contracts.

Next in order is the important question whether the stockholders or members of The Granville Cotton Manufacturing company are liable to contribution for those damages. And, if liable, are they bound personally to the whole extent of the damages, or only to the extent of the common property and funds of the company? This was a voluntary association for the joint and personal benefit of its members, who, by the



agreement styled "the constitution," dated the nineteenth day of April, 1815, declare their object to be "for manufacturing cotton yarn and cloth." By the first article they adopt a name, viz: "The Granville Cotton Manufacturing Company." The second article provides for a proper selection of their members to transact the business of the company, to be called "president and directors," and a treasurer. By the third, fourth, and fifth articles, particular powers and instructions are given in regard to the employment of a sub-agent and clerk, and their duties.

The sixth article declares that "each person shall at the time of subscribing for stock in said company, pay in cash on every share by him or her subscribed, ten dollars; and shall from time to time, and at all times hereafter, pay such assessments as shall be made by the president and directors, or forfeit such share or shares, with all previous payments made thereon." The construction to be given to the sixth article will determine the character of the association. The exposition given by his honor the chancellor is, that "the company could not be bound beyond the capital paid in, and the president and directors had no power, under the articles of association, to bind the members individually. Whoever dealt with the company as such, and without resorting to a personal covenant, was presumed to deal with them according to the terms of their constitution, and to give the credit to the funds of the company actually paid in, or to be paid in under assessments duly made. He had no right to look to the credit of the individual members, unless these individual members entered into a personal covenant or contract."

In considering the avowed object of this association, and examining all the provisions of their constitution, my mind has been led to a different conclusion. It was an inconsiderate and adventurous enterprise, and in all probability the question now agitated of personal liability for contracts made on behalf of the company, in the event of a deficiency of the joint fund, never actually occurred to the minds of the associates. If they meant to guard against such individual responsibility, it is extraordinary that they did not in their constitution expressly stipulate against it, and give public notice accordingly, instead of leaving it to silent inference. And the question also presents itself to my mind with some force, why, if they intended to avoid personal liability, did they not avail themselves of the statute which authorized them to incorporate themselves as a manufacturing company by filing a certificate in the secretary's office?

The provisions of that statute exactly applied to their case, and it depended upon their own volition whether they would avail themselves of that shield or not.

My first proposition is, that if the terms of their association do not, by fair and necessary construction, negate the intention of personal liability in judgment of law and equity, the members of the company are individually responsible for all debts contracted for the objects and within the scope of the association. If they did not mean to be personally liable for deficiencies, good faith required that they should speak unequivocally, and give notice that such were the terms on which they contracted. If they had accepted the franchise of an incorporation, offered to them by the legislature, their rights and duties would have been distinctly marked and understood, and no person would have confided in their personal responsibility.

In my judgment the sixth article, which is the only one relied on for that purpose, contains no such negation of personal liability. A capital was necessary to be provided; and it appears to me that the only object in that article of the copartnership, and which entirely satisfies all the words of it, was to determine the amount and the rule of contribution in regard to the sums to be invested as capital in their joint concern. And the stipulated forfeiture was intended merely as a summary means of enforcing the punctual compliance with that essential requisite. They were to pay in their proportion of capital, as required by the directors, or to incur the penalty of forfeiture. A forfeiture of shares under that article would undoubtedly also operate as a dissolution of the partnership, as to the person so forfeiting his shares in regard to all contracts subsequently made by the directors. To say that the sixth article was intended to secure to each stockholder a right to withdraw from the partnership whenever he pleased, would be adopting a construction which imputes to that article no positive meaning, nor any practical effect. Because each partner would have had the same right without any such provision. It is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other, that the partnership shall

continue seven years, either partner may dissolve it the next day, by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another, to make joint contracts for them both, is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it.

It is remarkable that there is a perfect silence throughout the instrument of association, in regard to profits and loss, and yet the law will intend that both were contemplated; and in the absence of all explanation on their part, we must intend that they were to be borne and enjoyed by the associates, in proportion to their shares of interest which are expressly stated. As to their organization and interior economy for conducting their joint concerns, the associates have made a law for themselves, by their constitution, as they had a perfect right to do. Articles of copartnership in almost every case, contain some peculiar provisions or restrictions which are valid and binding between the partners as such, but which have no application to those with whom they contract. These associates engaged in a bold enterprise exposed to great risks, and involving great expenditures. They provide for a regular succession of directors, but there is utter silence in the constitution in regard to their power of making contracts for land, buildings or machinery; and yet from their name of office, and the obvious design of their appointment, we must suppose it was intended that they should be the acting partners or agents of the company; and if they had power to act at all we must presume they had power to contract for machinery for spinning cotton, which was the avowed design of the institution.

The only specified power conferred on the directors is, in fourth article, that "it shall be the duty of the president and directors to appoint a general agent, whose duty it shall be to purchase stock, and vend the goods of said company," etc. But this obviously refers to a sub-agent, who was to conduct the ordinary business of the company, after the establishment should be in operation.

The whole scope of the testimony shows, that the members of the association recognized the directors, of whom the president was one, as the persons authorized to contract on their behalf, and the question now is, had they power to contract so as to bind the individual associates, beyond the common fund so placed under the management and control of the directors. In

my judgment the directors had power to bind the stockholders individually and personally for debts *bona fide* contracted in the regular prosecution of the business committed to their charge, and every contract made by them, as directors in general terms was obligatory on the associates to that extent. Whether any private individual stockholder had power to bind his associates, by assuming to contract, contrary to the fundamental rules, and organization of the company is a very different question, which does not arise in this case.

In the case of *McNeven v. Livingston*, 17 Johns. 437, this court decided that joint proprietors of patent rights for navigating by steam, on the mere ground of such joint interest, could not bind each other by any contract with any assignee of such right, "not connected with the enjoyment and exercise of their common privilege," which is in perfect accordance with the doctrine which I apply to this case. In the case of *Livingston v. Lynch*, 4 Johns. Ch. 573, his honor, the chancellor, decided that the association of stockholders of the North River Steamboat company, was not a partnership in a commercial sense, but the parties were tenants in common of the property and franchises belonging to the company, and that the constitution adopted and subscribed by all the members as the fundamental articles of their association, could not be abrogated or changed, except by unanimous consent. That was a suit by one of the associates against the other members of the company, to enforce the original stipulations of their constitution, which provided for the custody of their boats, the appointment of their officers, and the deposit of all moneys received by the captains, which provision a majority of the stockholders had resolved to modify and vary.

In maintaining the rights of the individual member against the innovations attempted to be imposed on him by a majority of his associates, the chancellor, undoubtedly, decided correctly. For admitting them to be partners in relation to contracts with others, they had a right to make a law for themselves as to all the objects of that decree. The reasoning of the chancellor on that occasion in reference to the case before him was conclusive; but with great deference I remark that there are several gratuitous *dicta* in that case to which my judgment cannot yield assent. Although the general law of partnership which gives to each partner an equal right to the custody and control of the chattels and money of the company, was in that instance modified by convention of the parties; yet while unin-

corporated it appears to me they were personally responsible as partners for all contracts made by their acknowledged agents, within the scope of their employment, and "connected with the enjoyment and exercise of their common privilege." Suppose the ostensible agent of such a company contracts for a steam-engine, or for fuel for their use, can it be admitted that in case of the destruction of the steamboats, or a deficiency in the common fund, the individual members of the association can escape payment by abandoning their worthless stock?

In the case now before us, the chancellor remarks, that the right of abandoning merely on forfeiture of stock, was reserved to the members "as a check to extravagance and abuse in the management of the company concerns;" and "it cannot be supposed that individuals who consented to take certain shares upon these terms intended to place their whole fortunes at the power and disposal of the directors."

In answer to these remarks, I apply the maxim "*judicandum est legibus, non exemplis*." It may justly be said that the object of these associates was private gain; they acted voluntarily and had a right to choose their own associates. Every partnership implies mutual confidence, and involves great risks; but it accords best with the principles of equity and public policy, that whoever speculates for gain in that mode, should also incur the hazards which attend it. The members of such associations, or those who represent them as agents or directors, must be presumed to know the amount and condition of their funds and resources; while others who contract with them have not the means of estimating their joint fund. It therefore seems to me that the wisest and most salutary "check against extravagance and abuse in the management of the company's concerns," is in holding the individual members responsible for deficiencies to *bona fide* creditors. If a contrary doctrine be established it will tempt men to speculate on the public credulity by rash and ill-advised schemes, which, if they happen to succeed, may enrich the adventurers; but where failure and consequent ruin are the result, the calamity must fall on other heads than their own. Bold enterprise and adventurous speculation for pecuniary profit form one of the characteristic foibles of our countrymen, and instead of being encouraged and lured on by personal indemnity, that spirit ought to be checked and restrained by the impressive consideration of individual risk and responsibility.

This brings me to the question, whether the contract made

originally by Reuben Skinner alone with White, Taylor & White was subsequently ratified and adopted by the directors of this company. The only directors were Reuben Skinner, Wm. Raymond, jun., and Abner P. Hitchcock. The answer of Wm. Raymond, jun., "denies that he ever approved of the said contract in any shape, or that he has ever intentionally done any act or thing to ratify the proceedings of the appellant." "He denies that ever the appellant consulted him upon the expediency of making the contract upon the terms ultimately concluded; and if he had done so this appellant would have dissuaded and protested against the same." And Abner P. Hitchcock, the other director, in his answer "wholly denies that he ever, directly or indirectly, gave his assent to said contract before or after its execution." In regard to Hitchcock, the other director, I perceive no evidence that he was consulted or that he assented to the contract before it was made. On weighing the evidence on this point I concur in the opinion of his honor, the chancellor, "that there is not the requisite evidence that the two directors, Raymond and Hitchcock, ever authorized the making of the contract."

But, in my judgment, the chancellor erred in his next conclusion, viz: "That the contract was never submitted to the consideration of the board of directors, and that it never received their united deliberation and assent." It is proved, without contradiction, that soon after the contract was made Skinner, as president, convened the board. All the directors attended; he laid before them the contract which he had made with White, Taylor & White, which on the face of it explained that he had assumed to act as their agent; their names were recited in it as the parties to be bound by it; they made no objection. One of them moved a resolution for an assessment of sixty dollars on each share, with an explanation that it was intended for the express purpose of meeting the first installment on that contract; and the time of payment was made to correspond with the contract, allowing time to send it to White, Taylor & White, at Troy. The other director seconded the motion, and the resolution for such assessment was unanimously agreed to. On the twentieth of May, 1815, the three directors wrote to White, Taylor & White a letter in the following words: "The bearer, Mr. Nathan H. Raymond, is authorized by us to call on you respecting the contract made for machinery for the intended factory; several shares have been forfeited, and consequently the remaining stockholders feel embarrassed, and will, of necessity,

have to abandon the business, unless some alteration is made in the contract conforming to the circumstances of the present stockholders. The bearer is authorized to make such alterations as the company feel able to meet." This letter was signed by all the directors; and to me it seems pregnant in every line with the most satisfactory evidence that the directors had ratified and adopted the contract, and meant to treat it as if it had been duly executed by them all.

These facts are undeniably proved, and although the two directors swear in their answers, that they "did not consent to nor ratify the contract," we must intend that they did not mean to deny these facts, which they soon after published in the church to a host of witnesses, but that they swore to what they understood to be the legal inference from those facts. On reviewing the whole series of conduct on the part of the directors, after the contract was presented for their ratification, my mind is irresistibly led to the conclusion, that it was adopted by them in their official character. They determined to carry it into effect, and laid an assessment for that purpose, and thereby they made their election and are concluded by it. When Skinner told them "he had run the company in debt fifteen thousand dollars, and did not know how they would like it," and presented to them the contract which he had sealed, good faith required that they should then have taken their stand, and have apprised him of their intention, if they meant to disavow the contract, and throw the burthen on him alone. If they had done so he might have found other associates, and provided other means of carrying the contract into effect, and secured himself against a ruinous loss, which now would be inevitable. "*Ratihabito retrohahitur, et mandato aequiparatur.*"

My opinion, therefore is, that in regard to the question of contribution, the stockholders stand in the same situation as if their agents, the directors, had originally made the contract on behalf of the company, and that all who continued to be stockholders at the date of the ratification of that contract are personally liable to such contribution, if the joint fund shall prove insufficient, and that White, Taylor & White are to be included as stockholders for two shares in respect to such contribution. As creditors, they have a right to recover damages under the contract, and as copartners, they are bound to contribution. Their subscription for two shares of stock was accompanied by a stipulation, that they, White, Taylor & White "should be exempt from any assessment, which had been or

should be made until the factory should be in operation," but this exemption extends only to assessments for capital stock to be invested in the joint concern, and has no application to their mutual responsibility for the debts of the company beyond the joint fund.

It follows, therefore, that it would be inequitable to allow White, Taylor & White to sue out execution, until the measure of contribution is settled, and a reasonable time has been allowed to enforce it. For these reasons, my conclusion is, that the decretal orders appealed from, ought to be reversed.

YATES, J., was of opinion that the decretal order, as between the appellant and White, Taylor & White, be modified, and the master directed to inquire into their actual losses and expenditures so far as they had proceeded with the contract; and that the decretal order in reference to contribution be reversed.

WOODWORTH J., concurred.

VAN NESS, J., was of opinion that the decree of the court of chancery ought to be affirmed, and gave his reasons.

SPENCER, C. J. I cannot think that the question, whether the appellant is bound at law to respond to W., T. & W., because he has entered into a covenant under seal, admitting that he had authority from the Granville Cotton Manufacturing Company, to make the contract, has been decided either, by the supreme court, or in this court on the former appeal. The appellant never availed himself of the permission given by the supreme court to amend his plea by setting forth his authority from the company to contract with W., T. & W. He saw fit to seek relief in equity, and when the case came before this court on the former occasion, it was from an appeal dissolving the injunction; and the argument proceeded on the bill and answer only. All the parties are now before the court; and it is not material to inquire what would be the strict principle of law as between the appellant and W., T. & W. The question now is, whether the appellant admitting him to be eventually responsible on his covenant to W., T. & W., is not as between himself and the other respondents entitled to call on them, to contribute towards the payment of such damages as W., T. & W. are entitled to recover by virtue of their contract, and whether all, or some only of the respondents, are liable to such contribution.

I take it to be clearly proved, that the appellant, who, to-



gether with William Raymond, Jr., and Abner P. Hitchcock, were the directors and agents of the company (which is a private unincorporated association), made the contract with W., T. & W., with the direct approbation and consent of Wm. Raymond, Jr., and that it was subsequently made known, assented to and ratified by A. P. Hitchcock, the other director, Ira Hall, Abraham Dayton, Reuben Wheeler and Nathan H. Raymond. Indeed all the respondents except Nathan Doane, have assented to and ratified this contract, either by being present and concurring in the assessment made the twenty-seventh of April, 1815, for the express purpose of raising moneys to meet the engagement entered into by the contract of the twenty-fifth of April, 1815, between the appellant in behalf of the directors and W., T. & W., by payments on that assessment with a full knowledge of the purpose and object of the call and assessment.

Both at law and in equity the subsequent assent of the principal to the act of an agent, in relation to the interest and affairs of the principal, is equivalent to a positive and direct authorization to do the act. Such subsequent assent is an adoption of the act of the agent, with a view to reap the benefit flowing from it; and he who receives the advantages and profits of a contract must assume the risk of the disadvantages of the loss which may attend it.

There would be no difficulty in coming to the conclusion that all the members of the association who ratified the contract were bound to abide the advantages and loss attending it, but for the terms of the association. The associates were partners as regarded each other and as regarded the public, who dealt with them and trusted them. Their respective liabilities to each other and to third persons ignorant of the terms of their association may undoubtedly be different. In the latter case they would be liable without reference to their private rules, but in the former case their own rules would be binding as among themselves.

It has been strongly insisted on that the only remedy which one of the members of the association can have against another is by a forfeiture of the shares held by such member. The sixth article of the constitution, or association, is as follows: "Each person shall at the time of subscribing for stock pay in cash on every share by him or her subscribed, ten dollars, and shall from time to time, and at all times thereafter, pay such assessments as shall be made by the president and directors, or

forfeit such share or shares, with all previous payments made thereon." The chancellor was of opinion that the appellant was not entitled to charge the other members of the association, individually, with any part of the damages for which he was liable under the contract to W., T. & W. He held that the company could not be bound beyond the capital paid in, and that the president and directors had no power, under the articles, to bind the members individually; and that whoever dealt with the company as such and without resorting to a personal covenant, was to be presumed to deal with them according to the terms of their constitution; and to give the credit to the funds of the company actually paid in, or to be paid in, under assessments duly made; and that he had no right to look to the credit of the individual member unless those individual members entered into a personal covenant or contract. He considered the sixth article as a check to extravagance and abuse in the management of the company concerns, and that every member reserved to himself the right to withdraw from further responsibility by refusing to pay any more assessments under the penalty of a forfeiture of his shares and of all previous payments made thereon. He was of opinion that the assessment of the twenty-seventh of April, 1815, implied no other obligation than to pay it, or submit to the forfeiture; that an assent to the assessment was no ratification of the contract, and that the other respondents were not chargeable with any breach of faith in refusing to pay it and submitting to the penalty; and that neither the appellant nor W., T. and W., could complain of any surprise or imposition by such refusal, for they were subscribers to the articles of association, and knew the tenor of it.

It seems to me, with all deference, that the opinion of the chancellor goes to the subversion of all claim or demand for compensation, by W., T. & W., for the non-fulfilment of the contract with the appellant, unless we are prepared to say, that the contract ought to be considered a personal covenant on the part of the appellant. It appears to me impossible that it should be so considered by a court of equity. W., T. & W. being subscribers to the articles of association, and knowing the tenor of it, knew as well as the appellant, whether he could bind the association by his contract. This case is entirely distinguishable from the one where a stranger is dealing with an agent who professes to have power to bind his principal, when he has no such authority. In that case, if the agent exceeds his power, he shall be personally bound, otherwise the party

dealing with him and ignorant of his defect of power, would be defrauded, but when the knowledge of the contracting parties is the same, when the defect of power is known to both, if the person assuming to be an agent acts in that capacity, but from defect of power, does not bind the principal, in such case the other party cannot impute fraud to him, and in the language of the chancellor "cannot complain of surprise or imposition."

No man can read the agreement between the appellant and W., T. & W. without seeing in every sentence of it, the complete sense of the parties, that the appellant was contracting as agent, for the sole benefit of the company, and that he did not mean, nor could W., T. & W. understand him to mean, to be personally bound. The agreement professes to be made by Skinner, Raymond and Hitchcock, as directors. They engage, in behalf of the company, to pay W., T. & W. the price stipulated for the machinery. They, as directors, engage to pay the balance due on the first six frames when put in operation, and the company further engaged to procure drums and belts for the machinery. The appellant alone signs and seals for the directors, and by way of postscript the company engaged to transport the machinery at fifty cents per hundred weight. Now, we perceive that at one time the directors engage in behalf of the company, at another for themselves as directors, and, in other parts of the agreement, the company engage, thus demonstrating that the agreement and engagement regarded a performance by the company alone. We perceive that the whole amount to be paid to W., T. & W. was fifteen thousand one hundred and twenty dollars. Is it possible to believe that they looked to the individual responsibility of the appellant? Did they not know that he was not to pay anything beyond the amount of his subscription? Did they not know that the stockholders were to pay ratably?

But it has been strongly contended that the appellant had not power to bind the company by this contract. I do not now mean as to their responsibility beyond voluntary payments upon calls, but that he had no authority to contract at all. The fact has already been stated that the associates elected the appellant as president, and William Raymond, Jr., and Abner P. Hitchcock as directors. Now under the fourth article of the association, it is declared to be the duty of the president and directors to appoint a general agent whose duty it shall be to purchase stock and vend the goods of the company, and under the particular direction of the president and directors, to transact all

such business as they shall deem best calculated to advance the interest of the company.

This virtually vests the power of transacting all necessary business in the president and directors; for if they could direct an agent to transact it, no agent having been appointed, they could themselves transact all necessary business. A power to direct the thing to be done implies a power in the persons authorized to give directions to do the thing themselves. Why were these appointments made, unless it was intended that the president and directors should act? How was the object of the association to be attained, but through the agency of the president and directors? They undoubtedly had authority to make contracts, or else the associates were never in earnest in the avowal of their intention to put in operation a cotton factory. It is not necessary to discuss the question whether the president and one of the directors could legally bind the company, without the concurrence of the other director, because the proof is clear and unanswerable that Wm. Raymond, Jr., did assent to the contract at the time, and that both he and A. P. Hitchcock fully approved it two days after it was made, by voting for an assessment to meet the payments stipulated in the contract. They were therefore bound; and all the associates excepting Doane, who was not present at the meeting on the twenty-seventh of April, were bound by the contract unless their responsibilities were limited to a forfeiture of the stock and previous payments.

This case then cannot be distinguished from that of *Randall v. Van Vechten*, 19 Johns. 60 [*ante*, 193]. That, also, was upon a covenant under the hands and seals of the defendants, and they stipulated to pay the sums mentioned in the body of the agreement. They were styled in the agreement, a committee appointed by the corporation of Albany for that purpose, but they signed and affixed their individual seals to it. The principal question in the case was, whether it was a personal covenant, binding the defendants individually, or whether it was a contract which bound the corporation. The supreme court held that when a person assumed to contract as an agent for an individual or a corporation, he must see to it that the principal was legally bound by his act, for if he does not give a right of action against his principal, the law held him personally liable. It was there said that the defendant contracted in the character of agent for the corporation, in relation to a subject exclusively appertaining to the corporation, and that they were not bound

unless the nature and form of the contract was such as to create no liability on the part of the corporation, and that it was incumbent on the defendants, in order to excuse themselves from personal responsibility, to show that the plaintiff had a legal remedy against the corporation. From the facts in the case, the court was of opinion that the plaintiff there had a remedy by an action of *assumpsit* against the corporation; and particular stress was laid on the fact that the corporation had recognized, adopted and ratified the contract by a variety of acts in reference to it. It was held that the corporation was not absolved, because their agents had entered into a sealed contract, and that the sealing of the contract by the agents did not alter the question. The same principle was decided by the supreme court of the United States in the case of *Bank of Columbia v. Patterson*, 7 Cranch, 297.

There is a striking analogy between these cases. Here the appellant contracted in the character of an agent for the company, and in relation to a subject emphatically theirs, with a joint interest of his own. Whether they were liable *eo instanti* is not made the test. They were liable before the arrival of the time for the fulfillment of the contract; and in that case, as here, their liability was evinced by their ratification and adoption of the contract. The variance in an important fact between the cases would vary also the conclusion on another point. Admitting, for the present, that the company were bound no further than they individually chose to comply with the assessment, it may then be said that the appellant is bound because he has not shown that W., T. & W. have a legal remedy against the company. But the important difference between the cases is this: Randell was not a member of the corporation, he knew nothing of their resolutions until after the contract was entered into; but W., T. & W. were members of this company; they knew, or were bound to know, if the case be so, that they would not be bound personally, or in any other way than by calls and assessments. The appellant, then, has shown that W., T. & W. have every legal remedy on the contract which was within the contemplation of the parties. The appellant has bound them by their subsequent ratification as fully as they could be bound by the terms of their association; and if they are not so bound as to be responsible fully to indemnify W., T. & W. for the losses they have sustained, it is not because the appellant had not power to bind or to contract for them, but because from the nature of the associa-

tion it was optional whether they would be bound or not. This risk and contingency W., T. & W. must be deemed to have contemplated. If the contract, or articles of association, were susceptible of this construction, it appears to me that such would be the consequence, and that the appellant would not be holden personally, he having acted in good faith, and W., T. & W. being fully apprised of all the facts, and acquainted with the articles of association.

But I cannot yield my assent to the principle that such of the respondents as ratified, adopted and confirmed the contract between the appellant and W., T. & W. are not responsible in their individual persons or property; nor can I assent to the position that under the sixth article of the association, those who have thus ratified the contract in question have a right to withdraw themselves from further responsibility by refusing to pay any further assessments, and by a mere forfeiture of their shares and the previous payments.

The object of the association was to manufacture cotton yarn and cloth; they were consequently to procure a site for a factory, to procure machinery, to purchase the raw material, employ workmen, and do everything necessary to the accomplishment of the object. I have already shown that under the fourth article of the constitution of the company, the president and directors had the power to transact all such business as they should deem best calculated to advance the interest of the company. They had the power to make assessments, and the ninth article provides that the president and directors shall give the stockholders of the company thirty days' notice of any assessment made, and payment required. Would it be a fair and natural construction of their powers; would it comport with the interests of the concern, or can it be presumed to have been the intention of the parties that no engagement should be entered into, nothing undertaken or done, until the calls had been made and the money actually in the hands of the treasurer? I think not; and the acts of the respondents show they had no such meaning.

It is in evidence that when the assessment of the twenty-seventh of April, 1815, was made, it was fully stated that it was made to meet the payments which would fall due under the contract with W., T. & W. This, then, was an express recognition of the right of the president and directors to make contracts, stipulating for future payment; and it was a practical construction of the terms of the association. But the president

and directors were, by the fourth article, authorized to transact all such business as they should deem best calculated to advance the interest of the company. This was a plenary power to enter into contracts and to incur debts, to promote according to their best discretion the interests of the association. Can it then be contended that it was the intention of the company that their confidential agents should assume responsibilities and pledge their private fortunes, whilst the other members of the association should be at liberty, if they thought it for their interest, to retire and throw the whole charge upon their agents, with no other loss than the forfeiture of their shares and the payments made? In the commencement of the business, and when heavy expenditures were necessary, they could thus retire with almost perfect impunity. The mere statement of the pretension seems to me to show its unreasonableness, and I think we ought not to construe the sixth article of the compact in a manner which would produce such unjust consequences. We must regard the end and object of the association, and all its provisions, in order to ascertain the real intention of the sixth article.

I have already stated that it binds the associates to pay the assessments made by the president and directors, or to forfeit each share or shares with all previous payments made thereon. It may well be questioned, whether the right of forfeiture is not one vested in the president and directors to be enforced, when one of the company shall neglect or refuse compliance with the assessments and calls. I much doubt whether it is a right vested in the individual, but admitting it to be so, good faith requires, and there is nothing in this article that forbids such construction, that the right should be exercised and an election should be made *in limine*. It is too late to resort to it, after the stockholders have assented to a contract made in their behalf and which imposes a heavy personal responsibility on their agents. If this particular contract with W., T. & W. had been repudiated on the twenty-seventh of April, two days after it was made, the appellant might have exonerated himself by procuring it to be rescinded; or had W., T. & W. been immediately informed that the stockholders were dissatisfied with it, and meant to avail themselves of their right to forfeit their shares, they would probably have desisted from carrying it into execution. On the contrary, the assessments were laid and the calls made without any opposition and with the express assent of all the stockholders except Doane; and thus the appellant and W., T. & W. were lulled into security and thrown off

their guard. They had a right to believe and to act on that belief, that the assessments would be paid. It is a principle of equity that when a man is bound to speak, and by his silence contributes to a fraud, he shall be compelled to repair the mischief his fraudulent silence has occasioned: 1 *Mad. Ch.* 210, 211. This principle is directly applicable to this view of the case, and I should consider it a fraud on the appellant and W., T. & W. for the stockholders to be silent, when provision was making for the fulfillment of the contract, with respect to their determination to forfeit their shares, and thus prevent its being rescinded; and afterwards when the mischief had happened, to interpose their right of forfeiture. Common honesty, as well as equity, forbids such a course.

My conclusion is, that although W., T. & W. would not have any remedy against the appellant solely, they have a good ground of action against the individuals composing the association, excepting Doane, and the parties being all before the court, there is no difficulty in applying the remedy, by directing a contribution ratably in proportion to the shares held by the respondents respectively for the payment of the sum justly due to W., T. & W. under the contract with the appellant.

Much stress has been laid on the fact that the appellant refused to pay the assessments on his shares. He had the same right to refuse as the other respondents; but this has nothing to do with the question whether those who thus refused are not now bound to contribute; nor has it any bearing on the question whether the appellant acted as the agent of the company in making the contract with W., T. & W., nor whether that contract was afterwards adopted and ratified by the company. I have not thought it necessary to refer to the evidence showing that adoption and ratification; this has been already sufficiently shown.

S. M. HOPKINS, senator, was of opinion that the decretal order as to damages be affirmed, that an account of the property, real and personal, of the copartnership be directed to be taken, to be applied to the payment of such damages, and that the defendants and appellant were not liable, in their individual capacity, on the contract.

BARSTOW, BOUCK, BOWNE, GURNEE, HASEBOUCK, HUNTINGTON, JUDSON, LYNDE, MILES, MILLER, MOORE, MORE, PAINE, ROSENCRANTZ, SEYMOUR and TOWNSEND, senators, were of opinion that the decree of the chancellor ought to be reversed.



ADAMS, AUSTIN, FROTHINGHAM and VICKS, senators, concurred in the opinion of Mr. Justice VAN NESS, that the decree of the chancellor ought to be affirmed.

A majority of the court (twenty-one for reversing, for affirming, five) being of opinion that the decree of the court of chancery ought to be reversed, it was thereupon "ordered, adjudged and decreed that the decretal order of the court of chancery appealed from be reversed. And it is further ordered, adjudged and decreed that it be referred to a master of the court of chancery to ascertain and report the actual damages, if any, sustained by W., T. & W. on the first day of August, 1815, under the covenant and agreement of the twenty-fifth of April, 1815, set forth in the pleadings; and that the master, with a view the more precisely to estimate such damages, ascertain and report the actual and *bona fide* expenditures in materials and labor incurred under and in fulfillment of the said covenant on the first day of August, 1815, the profits which W., T. & W. would have made on such expenditures only, and the value of W., T. & W. in market on that day of the work so done, which value to be deducted from the amount of such expenditures and profits, together with interest on the balance from the first of August, 1815, shall constitute the damages recoverable on the said contract. That it be referred to a master, to take and state an account between the appellant and all the respondents, except Nathan Doane, who were subscribing partners in the Granville Cotton Manufacturing Company, and the respondents, the representatives of Abner P. Hitchcock and Ira Hall, deceased, who were also subscribing partners in the said company, respecting the estate and concerns of the said company. And also to ascertain the sum which such partners, respectively, ought ratably to contribute to the damages, if any, that shall be found due to W., T. & W. That the injunction against the judgment at law be continued until such contributions shall have been ascertained, and until it shall be found that payment thereof, except the contribution of W., T. & W., cannot be enforced out of what may remain of the clear estate of the said company, or by process of execution; in which case, the deficiency, and no more, may be directed to be levied under such judgment. That the appellant's bill as to the respondent, N. Doane, be dismissed, with costs, as to him, in the court of chancery, to be taxed. That neither of the parties have costs as against each other in this court; and that the record be remitted to the court of chancery, to the end that this decree may be executed."

CASES  
IN THE  
COURT OF CHANCERY  
OF  
NEW YORK.

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**GLEN v. FISHER.**

[5 JOHN. CH. 22.]

**DEVISE SUBJECT TO CHARGE.**—A devisee accepting a devise of land chargeable with a legacy, makes himself personally and absolutely liable for its payment.

**INTEREST ON LEGACY.**—A devisee, in such a case, is liable for interest on the legacy from the time it was payable, although no payment was demanded.

**SETTLEMENT ON WIFE.**—Where husband and wife sue for a legacy due the wife, a suitable provision must be made out of it for the wife before it will be decreed to be paid to the husband.

**COSTS.**—When a bill is filed for the payment of a legacy, and the defendant has no right to resist its payment, he will be liable for costs.

**BILL** for an accounting. From the bill it appeared that the defendant's father devised to him a farm of wood-land, and after the death or re-marriage of his wife, he gave to his daughter, the plaintiff's wife, a cow and one thousand five hundred dollars in money, one fourth thereof to be paid by each of his four sons, within three years after the death of his wife. The plaintiff had married the daughter before the date of the will. The testator's wife died in September, 1815, a widow. The defendant entered into possession of the farm devised to him, estimated to be worth four thousand dollars. The property so devised was not sold, nor required to be sold, by the executors to pay debts. The bill further stated that the cow had not been delivered, nor had the defendant paid the plaintiffs the one fourth of the one thousand five hundred dollars, but the same remained due, with interest for three years. The substance of the bill was admitted by the defendant. He denied that a demand had been made, and claimed if one had been, a bond should have

first been tendered to the executors. He admitted he was the only surviving executor, and that the personal estate was sufficient to pay all the debts.

The questions coming before the court were: 1. Whether the plaintiffs should give security to refund, in case of a deficiency of assets; 2. Whether the legacy should be paid with interest after the expiration of three years from the widow's death; and, 3. And whether the plaintiffs were entitled to costs.

*Haring*, for plaintiffs.

*Chamberlain*, for defendant.

KENT, Chancellor. 1. The defendant has no right to require security to refund before payment of the legacy, for he does not pay the legacy in a representative character. The devise was given to him on condition of paying such a legacy to the plaintiff Catherine, and if he accepts of the devise, he takes it *cum onere*. This is the case of a devise creating a charge on the person of the devisee, in case of his acceptance of the gift, according to the distinction noticed in *Jackson v. Bull*, 10 Johns. 148 [6 Am. Dec. 321]. He did accept the devise, and he became thereby absolutely and personally bound to pay the legacy; he has no right to create any condition precedent to the payment, and the law makes none. He who accepts a benefit under a will must conform to all its provisions, and renounce every right inconsistent with them. This is an obvious and settled principle in equity. He accepts of the devise under the condition of conforming to the will, and a court of equity will compel him to perform the condition; for no man, says Chief Baron Eyre, *Blake v. Bunbury*, 1 Ves. jun. 523, shall be allowed to disappoint a will under which he takes a benefit.

2. The defendant is bound to pay interest from the time the legacy became payable. It was a charge upon the defendant in respect to the land devised to him, and as the land of course, yields rents and profits, the payment of interest from the time the legacy was payable, is very just and reasonable; and the interest runs, though the legacy was not demanded when due.

3. The plaintiffs are entitled to costs, for though no demand of the legacy is shown, the defendant says in his answer, that if a demand had been made, it would not have been complied with. A suit was therefore necessary on the part of the plaintiffs, by the admission of the defendant, and he ought, in justice, to be made chargeable with the costs. The pretense that security to refund was wanting, was mere pretext, for the tes-

tator has been dead upwards of twelve years, and there is an admission of personal assets sufficient to pay debts; and the presumption from lapse of time, is that there are no debts existing against the heirs, or personal representatives of the testator.

But as the husband and wife are here suing for the wife's legacy, the wife is entitled to a reasonable provision out of the legacy, small as it may be, before the decree in favor of the husband is pronounced. The doctrine is to be found in the case of *Howard v. Moffatt*, 2 Johns. Ch. 206; and there must be a reference to ascertain what would be a proper settlement in this case, unless some amicable arrangement takes place, or the wife voluntarily, on examination, waives any provision.

Decree accordingly.

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As to a personal liability where a devise is accepted subject to a charge, see *Rus'on v. Ruston*, 1 Am. Dec. 283; *Taylor v. Lanier*, 9 Id. 599.

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## KING v. BARDEAU.

[6 JOHN. CH. 28.]

**SPECIFIC PERFORMANCE OF CONTRACT OF SALE.**—Specific performance of a contract at auction will be decreed, where the sale is *bona fide*, the title good, and the quantity of land the same, and the description substantially true, although it may vary in a slight degree.

**IDEM—SLIGHT VARIATION.**—When two adjoining lots of land were sold together, in one parcel, for one price, and on one of the lots were buildings, which projected two feet on the other lot, it was held that this was not so material a defect in the subject, or variation from the terms of the description at the sale, as would entitle the purchaser to abandon the contract.

**COMPENSATION TO PURCHASER.**—Where the purchaser cannot by the use of ordinary diligence, discover a defect in land sold, and is misled by the advertisement of sale, he is entitled to compensation for any diminution of value arising therefrom, to be deducted from the price.

**PETITION** by one Whitehead, a purchaser at a sale of two lots, Nos. 42 and 43, on Broome street, under a decree of foreclosure. There were two buildings on lot 42, one in front, and the other in rear, which projected on lot 43, about twenty inches. The petitioner stated that his object in making the purchase was to build on the vacant lot, in a certain manner which he could not do, in consequence of the building projecting as stated. He had no knowledge of such fact at the time, and the advertisement stated the premises free from incumbrances.

The petitioner applied for relief.

The chancellor states the facts so fully, that any further statement is unnecessary.

*Hopkins*, for petitioner.

*S. Jones and King*, contra.

KERR, Chancellor. This sale was marked by good faith. It was unknown to the plaintiff, and to the master at the sale, as well as to the purchaser, that the front building on lot 42 projected over upon lot 43. The observation that was made to the master, a few days before the sale, that the building in the rear of the lot encroached in a very small degree on the neighboring ground, was too light and trivial a circumstance to affect the *bona fides* of the transaction. The purchaser was informed at the sale, and it was one of the terms of sale repeatedly read over, and publicly proclaimed, that the two lots would be sold together as one lot or parcel, and that they were free of all incumbrances, except the lease upon lot 42. The terms of that lease, and the disposition of the buildings at the expiration of it, under the covenants in the lease, were also explained. But the buildings were stated to be on lot 42, and it turns out that they do project a little over upon lot 43, and this is the variation in the condition or quality of the lots, which it is contended ought to vacate the sale. As the purchaser purchased both the lots together for one consolidated price, and as one entire parcel of land, it would seem not to be very material to him if the buildings on one lot did encroach a few inches on the other. But he says he purchased with intention to build a house upon the vacant lot, twenty-two feet wide, leaving an alley of three feet to pass to the rear of his lot. The disappointment in the case then is, that he will be obliged to build his house two feet narrower, if he intends to have the alley of the width of three feet. He is not disappointed in the main object of his purchase. He has the lots of the dimensions described, and with a perfect title, but his house will be a little narrower, if he will not contract his alley, or will not wait until the lease expires, or will not compel the tenant to withdraw his buildings on to lot 42.

This is clearly not such a material defect in the subject, or variation from the terms of the description at the sale, as will permit the purchaser to abandon his contract. If we were to allow such very nice and critical objections to prevail, we should expose to great hazard the efficacy and value of public judicial sales. If the sale be fair, and the title good, and the quantity of land exist, and the substance of the description be true (and

all those circumstances exist in this case), it is as much as ought to be expected or required. Some care and vigilance must be exacted of the purchaser. In this case the purchaser lived near the lots, and they were open to his daily examination, and one of the witnesses says, he might have observed by the eye, without even the trouble of measurement, that the house on the front of lot 42, projected a little upon lot 43.

In *Calcraft v. Roebuck*, 1 Ves. jun. 221, a farm sold at auction was advertised as a freehold estate, consisting of about one hundred and eighty-six acres, of which forty-five acres were described to be a compact farm, and the rest a park. It turned out that two acres in the centre of the park were not freehold property, but land held at will only. On a bill for specific performance, Lord Thurlow observed, that where an estate was sold at auction, it was difficult to state specifically all the little particulars relative to the quantity, title, and situation of the estate, so as not to call for some allowance and consideration, when the bargain comes to be executed. He considered that the binding force of the contract, and the consideration of enforcing it, depended essentially upon the good faith with which it was made. In that case he gave the party some compensation for the failure of title as to the two acres, and referred it to a master to consider what, under all the circumstances, ought to be allowed as a deduction from the price, when the money ought to have been paid.

The English rule has been very strict in requiring the specific performance of these sales at auction, when the case was free from misrepresentation and fraud, and it casts upon the purchaser the duty of informing himself of matters within his means of information, in respect to the quality, condition, situation and circumstances of the subject sold. Thus, in *Oldfield v. Round*, 5 Ves. 508, there was a bill for a specific performance of an agreement to purchase a meadow sold at auction. The defendant objected, that the premises were described as a meadow consisting of fifteen acres, without taking notice of a footpath across it. But Lord Loughborough, while he admitted that the meadow was very much the worse for a road going through it, said he could not help the carelessness of the purchaser who does not choose to inquire, and that the path in that case was not a latent defect. He accordingly decreed a specific performance, with costs. This case was afterwards shaken by Lord Manners, *Elland v. Lord Landaff*, 1 Ball. & B. 241, who said it was not well received at the

time, though he admitted that the purchaser in that case, if he had used ordinary caution, would have discovered the easement. In *Dyer v. Hargrave*, 10 Ves. 505, there was a bill also for a specific performance of a purchase at auction. The particular preceding the sale described the house as in good repair, and that the farm was all within a ring fence. The defendant objected, on the ground that the description was not true. It was admitted that there was a variation from the description, but a minute examination might have discovered the defect. The master of the rolls decreed a performance, and said it was much too late to contend that every variance from the description would enable a man to resist the performance. If he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value.

This last case establishes what I apprehend to be the true doctrine on the subject; and many of the old cases which required a performance when the subject was substantially different from what it was supposed to be, have been justly questioned. Lord Eldon in *Drewe v. Hanson*, 6 Ves. 678, mentioned a number of hard cases in which performance had been enforced, though there was a very essential variance between the actual and the supposed circumstances of the subject, and when those circumstances were wanting, which were the strong inducement to the contract. The counsel in 10 Ves. 507, considered those cases as going to an excessive length upon the point of compensation; and Lord Erskine afterwards declared, *Halsey v. Grant*, 13 Ves. 78; *Stapylton v. Scott*, Id. 426, that he would not follow those decisions, nor decree specific performance, even under the allowance of compensation.

In the present case there is no pretense that the substantial inducement to the purchase has failed by reason of the projection of the house. There is no analogy whatever between this case and that stated by Lord Eldon of a contract for a house and wharf. The object of the purchase being to carry on business at the wharf, and though the title to the wharf had failed, the court compelled the purchaser to take the house. Here are the lots and a good title, and the lease as disclosed; and all the disappointment is that the purchaser may be obliged to compel his tenant to remove his house a few inches, or to make his own intended building or alley a few inches narrower than his original plan. The main inducement to the purchase cannot be said to be defeated by that circumstance. Nor is there anything in the case to prevent the conclusion, that the purchaser

can, by ejectment, recover possession of the land so encroached upon by the buildings.

But, while the case most clearly requires that the contract of sale should be fulfilled, yet the fact of the encroachment of the buildings on lot 43 was not such a patent and obviously visible circumstance as to conclude the purchaser from compensation, if the case should otherwise entitle him to it. The strongest ground for compensation is, that the vendor himself, in his notice, declared that the two dwelling houses were on lot 42. Now it turns out that they are partly on lot 43; and if a person, as Lord Thurlow observed, 1 Ves. jun. 210, however unconversant in the actual situation of his estate, will give a description, he must be bound by it, whether connusant or not. I shall, therefore, declare that the purchaser is held to perform his contract, and shall direct an inquiry by a master, as to the amount of compensation, if any, which ought to be made. It appears from one of the cases already referred to, and from that of *Harniblow v. Shirley*, 13 Ves. 81, that such is the course of the court in cases where compensation is to be made from incumbrances or defects in the subject.

Order accordingly.

## STORRS v. BARKER.

[6 JOHN. CH. 166.]

**EQUITABLE ESTOPPEL.**—Where one who has the legal title to land acquiesces in its sale by a person under a claim of title, and, moreover, advises and encourages the parties to carry out such sale, he will be estopped from asserting his title against the purchaser.

**IGNORANCE OF LAW.**—Ignorance of the law, with a full knowledge of the facts, cannot generally be set up as a defense; nor will it protect a party from the operation of the rule in equity, when the circumstances would otherwise create an equitable bar to the legal title.

**BILL** for injunction against an action of ejectment. The facts are stated in the chancellor's opinion.

*H. B. Potter*, for plaintiffs.

The counsel for defendant do not appear.

**KENT**, Chancellor. The defendant is seeking to enforce his title at law to six and a half acres of land in the village of Buffalo, under the following circumstances, which are supposed, on the part of the plaintiffs, to have created an equitable estoppel.



John Johnston devised by will to his wife Ruth all his real and personal estate, and he died seised of thirty-nine and one half acres of land, of which the land in question was a part. His wife, after his death, conveyed thirty-three acres of the land, for a valuable consideration, to the defendant, her father, and then married Elisha Foster. She, by will, devised the six and one half acres to her second husband, in consideration of his affection, and particular kindness to her during her protracted sickness, and died without issue in October, 1812. This devise to her husband was made with the approbation of her father's family, and there is good ground to conclude, with the approbation of the defendant himself, who mentioned the devise as being just and proper. The defendant and Foster lived very near each other at the time of the death of Mrs. Foster, and for a year afterwards, and Foster continued to occupy the six and one half acres of land as his own, and claimed the same under his wife's will. In July, 1813, he sold the land by a deed, with full covenants, and for a full and valuable consideration, to the plaintiff, Storrs, and the defendant, before the sale, which was in a train of negotiation for some weeks, repeatedly advised Foster to sell and Storrs to buy. He told Foster that he thought his title good under the will. He was also asked, on behalf of Storrs, before the purchase, whether he did not claim the land by inheritance, and he replied in the negative, for that his daughter had made a will. After the purchase by Storrs, in the summer of 1813, the buildings on the lot were destroyed by the enemy, and the plaintiff S. claimed and received compensation for the same from the United States. Storrs continued to occupy the land, as owner, and erected a building on it in 1814 or 1815, and with the knowledge of the defendant, who never advanced any claim to the land, as heir to his daughter, until the latter part of the year 1816.

Here, then, is the case of a person, knowing and approving at the time, as we have good reason to infer, of his daughter's devise of her small real estate of six and one half acres of land to her second husband, as a token of her affection and remuneration for his kindness; and of that husband retaining possession, as owner, after his wife's death, with the knowledge and assent of the defendant, and then selling the land to a third person, with the advice of the defendant, who expressly encouraged the one to sell and the other to buy. He afterwards permitted that buyer to make improvements, and exercise acts of ownership upon the land for the space of three years, before he advanced

his claim as heir to his daughter, and founded on the invalidity of her will. If the case rested on these facts alone, it would fall within the rule of equity, that where one having title acquiesces, knowingly and freely, in the disposition of his property for a valuable consideration by a person pretending to title, and having color of title, he shall be bound by that disposition of the property; and especially if he encouraged the parties to deal with each other in such sale and purchase. This doctrine was mentioned in the case of *Wendell v. Van Rensselaer*, 1 John. Ch. 344, and is most amply supported by a series of decisions, some of which were referred to in that case. It is deemed an act of fraud for a party, connusant all the time of his own right, to suffer another party, ignorant of that right, to go on under that ignorance and purchase the property, or expend money in making improvements upon it. Mr. J. Lawrence, 6 T. R. 556, recollected a case in which Lord Mansfield would not suffer a man to recover, even in ejectment at law, who had stood by and seen the defendant build upon his land. However we may question the existence of such a rule in a court of law, yet in equity it is well established; and it seems to be immaterial whether the real owner was induced to conceal his title and omit to assert it from fraudulent motives, or from other considerations which he deemed at the time prudential, as was the case with the defendant in *Raw v. Pole*, 2 Vern. 239.

But in this case the defendant endeavors to withdraw himself from the operation of this rule by the averment that he mistook the law of the land, and did not know that the devise of a *feme covert* was void, or that his title was good as heir to his daughter, until late in the year 1816. I am induced from the proofs in the case to believe in the truth of the averment; and the question then arises whether that ignorance of his own title will prevent the application of the doctrine.

The presumption is that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim his property in opposition to all the equitable circumstances which have been stated, upon the mere pretense that he was at the time ignorant of his title. Such an assertion is easily made and difficult to contradict. It is rarely that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practiced upon mankind; and if the person, as in this case, is

not merely silent and passive, but gives explicit confirmation to the title of the party in possession, and encourages him to sell, and encourages the purchaser to buy, the case is greatly altered, and equity and policy equally dictate that he, and not the purchaser, ought to suffer. His ignorance of the law ought not to protect him from the operation of the rule of equity. He could easily have dispelled that ignorance, for he had the fact of the will of his daughter before his eyes; and if he may be allowed to plead his voluntary ignorance in destruction of equitable rights growing out of his own acts and assertions, the grossest imposition and the greatest fraud might be practiced with impunity. It would seem, therefore, to be a wise principle of policy, that ignorance of the law with knowledge of the fact cannot generally be set up as a defense; and it appears to be settled by a course of equity decisions, that ignorance of one's legal right does not take the case out of the rule, when the circumstances would otherwise create an equitable bar to the legal title.

*Dyer v. Dyer*, 2 Ch. Cas. 108, is the earliest case on this point. It came before the court in June, 1682, Trinity Term, 34 Car. II.; and we have only the statement of the case, raising the point of law, and the argument of counsel, but no decision. The plaintiff purchased of J. D. an annuity or rent charge of one hundred pounds, which had been settled on J. D. by the defendant's father, and which the defendant had continued to pay for twelve years. While the plaintiff was in treaty to purchase the annuity, he inquired of the defendant whether there was such a grant, and such payments, and whether it had been revoked. The defendant confessed the grant and payments, and that it had not to his knowledge, been revoked; and the plaintiff accordingly purchased the annuity at the price of two thousand pounds. The plaintiff filed his bill to enforce payment, and the defendant set up that the grandfather had made settlements on marriage by which the defendant's father could not make such a grant, and that these settlements were concealed from the defendant. The cause was brought to a hearing on bill and answer; and it was contended on the part of the plaintiff, that be the defendant's title what it might, yet he had encouraged and drawn the plaintiff in to purchase, and the plaintiff was not to be hurt. On the other side it was stated, that ignorance of a man's title shall not prejudice it, and that the defendant was not guilty of any mis-information or concealment; and upon this the lord chancellor

is reported to have said, that "ignorance of his title differed the case;" and he put off the hearing until a cross-bill for discovery of the settlement could be brought on.

The case of *Hobbs v. Norton*, 1 Vern. 136, 2 Ch. Cas. 128, arose about the same time. It is given in Vernon as of Hil. term, 1683, before the Lord Keeper North; and in chancery cases, as of Mich. term, November 1682, before the Lord Chancellor Nottingham. The former report gives the decree as being pronounced upon a rehearing by the lord keeper; and the latter gives no decree, or opinion, and only the substance of the pleadings. The facts in this case are so exceedingly analogous to those in *Dyer v. Dyer*, that one is strongly induced to think it must be the same, under different names, and which as we have seen, had been directed a short time before, to stand over. Be this as it may, it appears that Lord Chancellor Nottingham gave no decision on the question, whether ignorance of a man's legal right will protect him against the consequences of encouraging others to deal with his property as their own. The first authoritative decision on this point was made by Lord Keeper North, who succeeded to the great seal in January, 1683, as Lord Nottingham's successor.

The case of *Hobbs v. Norton* was shortly this: A younger brother of the defendant had an annuity of one hundred pounds, charged on lands, by his father's will, with power of revocation, and he contracted to sell it to the plaintiff, who went to the defendant and told him he was about to buy the annuity, and desired to know if his younger brother had a good title to it, and whether his father was seised in fee at the time of the will, and whether there was any revocation made. The defendant said he believed his brother had a good title, and he had paid him the annuity for twenty years; but he had heard there was a settlement of his father's lands before the will, though he had not seen it, and he encouraged the plaintiff to proceed in his purchase, who accordingly made it for a valuable consideration. Afterwards the defendant got possession of the settlement, by which the lands were entailed by his ancestor, and the annuity as against him void. The defendant wished to avail himself of this settlement, and there was no proof that at the time he encouraged the plaintiff to purchase he had any notice of the settlement. His defense was, that he then knew nothing to the contrary of a good title to the annuity in his younger brother, and that the payment of the annuity and the acknowledgment of its validity were innocently made by him while he was igno-

nant of his right. The lord keeper decreed payment of the annuity, and that the defendant should confirm it to the plaintiff, with an election to the defendant, in a twelvemonth, to purchase of the plaintiff; and he decided purely on the ground of the encouragement given to the plaintiff to proceed to his purchase, and that "it was a negligent thing in the defendant not to inform himself of his own title." The younger brother was all the while knowing to this settlement, and, therefore, as between him and the defendant the case, it is said, might admit of another consideration.

This case strikes me as being entirely in point, and it shows that the ignorance of the invalidity of the will of his daughter, put forward by the defendant as an excuse for the belief and admission of the title of Foster, the devisee, does not prevent the application of the rule, that he who encourages another to buy of a third person a right to which he himself has a title, is to be postponed in equity to such a purchaser.

The fact that the defendant did give such encouragement to Foster to sell, and to the plaintiff Storrs to buy, is abundantly proved. One witness (J. Landon) says, he heard the defendant say, he wished Storrs would buy the land, as it would be a sale beneficial to both him and Foster, and he requested the witness to advise Storrs to buy, and shortly afterwards the defendant told him that Foster and Storrs had bargained for the land, and was glad of it. Another witness (B. Caryl) says, the defendant told him he had advised Foster to accede to the terms of sale proposed by Storrs, and the defendant had several conversations with him, the witness, concerning the sale pending the negotiation between Foster and Storrs, and he advised Storrs to purchase, and uniformly advised the sale by Foster. A third witness (Eliha Forster) who appears to have been rendered a competent witness by a release from Storrs, declares also, that the defendant advised him to sell, and the defendant knew of the sale when it was made, and he told him that he considered his title under the will good. A fourth witness (J. A. Barker) states, also, that Caryl, a partner in trade with Storrs, asked the witness about the title to the land, when Storrs was about buying, and wanted to know if the defendant did not inherit it, for that his daughter had made a will, and this information was carried back to Caryl, who, as the witness believed, communicated all his information on the subject to Storrs before the sale.

There is, then, no doubt, from the testimony of these four witnesses, of the fact, that the defendant did actively encourage

the sale by Foster, and purchase by Storrs, and did positively admit the right and title of Foster. The decision of Lord Keeper North in *Hobbs v. Norton*, was confirmed in subsequent cases, and it has never been overruled or questioned.

In *Hemaden v. Cheyney*, in 1690, 2 Vern. 150, the mother was tenant in tail of a term, with a right of disposal at her pleasure, and she was present at a marriage treaty made by her son, in which he declared that the term was to come to him after his mother's death, and he settled the reversion of the term, after her death, on the issue of the marriage, and she did not mention or insist that she had more than a life estate in the term. A bill was filed by a son of a marriage, to compel his grandmother to make good the settlement as to the reversion of the term, after her death. She insisted that she was ignorant of the title, and not guilty of any fraud, and knew not that she was tenant in tail of the term. But without regarding this excuse, the lord commissioners decreed according to the prayer of the bill. So again in *Teasdale v. Teasdale*, Mich. 1726; Sel. Cas. ch. 59; 13 Vin. 539, pl. 4; 1 Fonb. 151, n. S. C. B., on marriage with M., settled a jointure on her, with the approbation of A., his father, who witnessed the deed. The son died, leaving a large personal estate, and made M. his executor. Afterwards, A., the father discovered that B. was only tenant for life, and that the fee was in himself, and he recovered at law. On a bill by the wife, Lord Chancellor King said, he should make no difference, whether A. knew of his title or not, at the time, considering the near relation of father and son.

That it was plain it was thought the son had a fee, and had it been known to have been in the father, his joining would have been insisted on; else the marriage would not have been had. As he knew of the settlement, he should not take advantage of it. The chancellor decreed the usual jointure to be made upon her, instead of obliging her to resort to the son's covenant, and compel the jointure to be made good out of the personal estate. It can hardly be supposed that Lord King laid much stress on the circumstance of the relation of father and son, and if he did, we have here, also, the relation of father and daughter, and the most powerful appeal to the parental feelings of the defendant, and his sense of moral obligation to hold good the will, which his daughter had been prompted to make by the best dictates of the heart, and with the approbation of her father's family, and if we may give credit to two of the witnesses (Walden and Caryl), by the encouragement of the defendant himself. The

recognition of that will, and of the title under it, and of the transfer of that title for a series of years, with full knowledge of all the facts, forms one of the strongest cases that can well be presented for the interposition of a court of equity to protect that title, and prevent it from being disturbed.

It may be said that the plaintiff Storrs was, equally with the defendant, presumed to know that the will of a *feme covert* was void. There is no evidence of his knowledge, in fact, of the invalidity of Foster's title, and if he had been acquainted with that rule of law, he had good reason to presume from the acts and conduct of the defendant that the will of the daughter had been either previously authorized by the defendant, or had received a valid recognition by him since her death. He had a right to consider the defendant's title as heir duly waived or abandoned, and certainly there is no color for an inference that any deception or fraud was practiced by S. to the plaintiff B., by proof that it was given without consideration, and to defraud creditors. This is not the proper time to determine on the validity of that deed. If the deed be fraudulent and void as against creditors, it may be good as against the defendant, and the plaintiff B. either holds the deed in his own right, or as trustee for the creditors of Storrs. The title under Foster is in one of the plaintiffs, and the defendant is equally barred from asserting his legal title against the equity of the case, whether B. holds in his own right, or in trust for others.

I shall accordingly decree, that the defendant be perpetually enjoined from prosecuting at law his right, claim, or title, as heir to his daughter, Ruth Forster, to the six and one half acres of land in the pleadings mentioned, and that no costs of this suit be charged by either party as against the other.

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**IGNORANCE OF LAW.**—The maxim *ignorantia legis non excusat* is one of the oldest in our law, and of frequent application. The doctrine is well established, on the principle that if ignorance of the law should excuse, or entitle to relief, there is no knowing to what length it would be advanced; and there would necessarily be great injustice, from the inherent difficulty of the proof in such cases. The doctrine, therefore, has been generally accepted as sound. But it is remarkable that few, if any, authorities, lay down the broad, unqualified proposition that ignorance of the law will never excuse, or entitle one to relief. Kent, in the principal case, states the doctrine guardedly. Story, in his *Equity Jurisprudence*, states the doctrine in the same guarded manner. He says (sec. 111): "It is a well known maxim that ignorance of the law will not furnish an excuse for any person, either for a breach or for an omission of duty, *ignorantia legis neminem excusat*; and this maxim is equally as much respected in equity as in law." So Fonblanque lays it down as a general proposition that, in courts of equity, ignorance of the law shall not

affect agreements, nor excuse from the legal consequence of particular acts: 1 Foub. Eq. B. 1, ch. 2, sec. 7.

Chief Justice Marshall and Justice Washington, in *Hunt v. Rousmaniere*, 8 Wheat. 174, concede that there may be cases where this defense may be available. Marshall says: "We find no case in which it has been decided that a plain and acknowledged mistake of law is beyond the reach of equity." And Justice Washington, although evidently against affording relief generally in such cases, said: "It is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law."

It is, therefore, evident that the limits of the rule are not well determined, and that courts have hesitated to apply the rule in its broadest and most unqualified extent. In considering this question it will be convenient and advantageous to regard it from two standpoints: 1. Mistake of law as a ground of relief; 2. As a defense in a civil suit.

1. AS A GROUND OF RELIEF.—A common case where ignorance of the law is invoked as a ground of relief is where one has paid money under a mistake of law, and seeks to recover it back. The leading case in England on this point is *Bilbie v. Lumley*, 2 East, 469. This was an action brought by an underwriter to recover back money paid on a loss by capture on the ground that the money was paid under a mistake of law. Lord Ellenborough said: "Every man must be taken to be cognizant of the law, otherwise there is no saying to what extent ignorance might not be carried. It would be urged in almost every case." So it was determined that in this case no recovery could be had. This is now a well settled doctrine; and it may be generally laid down as sound, that where money is paid under a mistake of law, where there is nothing unconscientious or fraudulent in the party receiving it, it cannot be recovered back: *Bize v. Dickason*, 1 T. R. 285; *Brisbane v. Dacres*, 5 Taunt. 143; *Lowry v. Bourdieu*, Doug. 468; *Freeman v. Curtis*, 51 Ma. 140; *Irvine v. Hanlin*, 10 Serg. & R. 219; *Deysner v. Triebel*, 64 Pa. St. 383; *Real Estate Sav. Institution v. Linder*, 74 Id. 871; *Silliman v. Wing*, 7 Hill, N. Y. 159; *Elliott v. Swartwout*, 10 Peters, 137; *Tyler v. Smith*, 18 B. Mon. 798; *Covington v. Powell*, 2 Met. Ky. 229; *Bacon v. Bacon*, 17 Pick. 134.

An important exception to this rule is made in *Haven v. Foster*, 9 Pick. 112, where it is held that ignorance of the law signifies ignorance of the laws of one's own country, and that ignorance of the law of a foreign government is ignorance of fact; therefore money paid by mistake through ignorance of the law of another of the United States may be recovered back. The discussion given to the law in this case by the counsel and court was very thorough, and the case is therefore entitled to much regard.

The decisions in Kentucky have gone further in allowing a recovery of money paid under a mistake of law, than have those of other courts: *Underwood v. Brochman*, 4 Dana, 317; *Ray v. Bank of Kentucky*, 3 B. Mon. 510; *Gratz v. Redd*, 4 Id. 109. In *Ray v. Bank of Kentucky* it is held that if the indorser of a bill of exchange pay off the bill after protest, when he is legally exonerated, in ignorance of his legal rights, he may recover the amount back in *assumpsit*. The court in this case lay down the principle that where money has been paid under a clear and palpable mistake of either law or fact essentially bearing upon and affecting the contract, without cause or consideration, and which in law, honor or conscience was not due and payable, it may be recovered back. Similar doctrine is held in South Carolina, in *Lawrence v. Bearbien*, 2 Bailey, 623. Here there is an exhaustive examination of the question.



It is not to be denied that there are in England and in this country many decisions favoring the view that money paid under a mistake of law, where there was no moral or honorable obligation to pay it, can be recovered back in an action of *assumpsit*. See, as favoring this doctrine, *Farmen v. Arundel*, 2 W. Bl. 825; *Perrot v. Perrot*, 14 East, 422; *Herbert v. Campion*, 1 Campb. 134; *Northrop v. Graves*, 19 Conn. 548; *Cobb v. Charter*, 32 Id. 358; *Culbreath v. Culbreath*, 7 Ga. 64. The language of the court in *Northrop v. Graves* deserves attention. It is there said: "We do not decide that money paid by a mere mistake in point of law can be recovered back, as if it had been paid by an infant, by a *feme covert*, or by a person after the statute of limitation has barred an action, or when any other merely legal defense exists against a claim for the money so paid, and which might be honestly retained. But we mean distinctly to assert, that where money is paid by one under a mistake of his rights and his duties, and which he was under no legal or moral obligation to pay, and which the recipient has no right, in good conscience, to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law; and this we insist may be done upon the principle of christian morals and the common law." The doctrine here asserted would seem to embrace the decisions generally. When it is said that money paid under a mistake of law can be recovered back, there is a further assumption made, that the party so recovering it had no kind of right, moral or legal, to the money. He would then be guilty of a fraud in retaining it, and the cases hold that here the action will lie. The rule is different where a party received the money under a claim of right, but against which there was a valid legal defense, of which the party paying was ignorant. In this case the latter cannot avail himself of the mistake to recover the money back.

AS A GROUND OF RELIEF IN EQUITY.—Story lays down the proposition that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake: 1 Eq. Juris. sec. 121. In regard to this, he afterwards says that it must have the material qualification, that the party has, upon plain and settled principles of law, a clear title, and yet is in gross ignorance that he possesses any title whatsoever. *Pusey v. Desbourrie*, 3 P. Wms. 315, is a good illustration of this principle. In this case the daughter of a freeman of London had a legacy left her by her father's will, upon condition that she should release her orphanage share, which amounted to a much larger sum. In ignorance of this right, she released it. Upon a bill, afterwards filed by her, against her brother, who was the executor, she was restored to her orphanage share. Lord Chancellor Talbot said, it seemed hard that a young woman should suffer for her ignorance of the law, or of the custom of London, or that the other side should take advantage of that ignorance. But in this case, there was not a pure mistake of law, for the daughter placed reliance on her brother for information as to her rights, and more properly the relief might be founded on misplaced confidence, and a consequent mistake. This justifies the remark made by Story, that in many cases where relief has been granted, there will be found something peculiar in them, involving some other elements of decision.

In *Brigham v. Brigham*, 1 Ves. sen. 126, the plaintiff purchased an estate which he already owned under a mistake of law, and the court ordered the defendant to refund the money, holding that "there was a plain mistake such as the court was warranted to relieve against." There could be no case better showing the necessity for a relaxation of the general rule than this.

While it is a safe rule to apply generally that ignorance of the law, ought not by itself to afford relief in equity, the application of the rule becomes difficult when applied to particular cases. Then the maxim "*cessante ratione legis, cessat ipsa lex*," applies. In this case, the foundation for the rule does not exist—the difficulty of showing the ignorance; for it is unquestionable that no one knowing his legal right to an estate would purchase it. The doctrine asserted by Lord Westbury, in *Cooper v. Phibbs*, 15 W. R. 1053; 2 H. L. Cas. 149, would seem to be well illustrated by the two previous cases. He says: "It is said *ignorantia juris haud excusat*, but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country; but when the word 'jus' is used in the sense of denoting private right, that maxim has no application. Private right of ownership is matter of fact. It may be the result also, of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded on a common mistake." See to the same effect: *Turner v. Turner*, 2 Rep. in Ch. 81; and see the discussion of the subject in 1 Story's *Eq. Juris*. sec. 116 *et seq.*

The case in this country, which is most frequently cited on this head, is *Hunt v. Rousemaniere*, 8 Wheat. 174; 1 Pet. 1. There the defendant's intestate, in order to secure payment of a loan from the plaintiff by a lien on certain vessels, gave a power of attorney authorizing the plaintiff to sell his interest in the vessels, being advised thereto by counsel, that it would afford as effectual security as a mortgage, and would occasion less trouble from renewal of papers, etc. The admitted intention of both parties was to create a permanent security in the nature of, and equivalent to, a mortgage; but the debtor having died soon after, the power of attorney was thereby revoked. The plaintiff then applied to the court and asked to have the intention carried out, that is, to have the power of attorney reformed into a mortgage. The court refused the relief. There was here a pure mistake of law in this, that the parties had mistaken the legal effect of the power of attorney. The real point and import of this decision has often been misapprehended; for we sometimes find counsel on both sides citing it, as favoring the general rule, and as being opposed to it. This arises from the language of the judges in giving their opinions, which leads many to believe that equity will relieve in many cases a mistake of this nature. The true import and limit of the decision is seen from the language of the court in *Oliver v. Mutual Ins. Co.*, 2 Curtis, 277, where it is said: "It is true, as settled by the supreme court in *Hunt v. Rousemaniere*, that the inquiry in all these cases must be, not how the parties intended or expected an instrument to operate; but what they intended it to be. But there is a wide distinction between a case where an instrument is what the parties agreed it should be, but its legal effect is unexpected, and a case where an instrument was designed to carry into effect an existing binding agreement, but by mistake fails to do so. In the former case the party never had a right to anything more than he has got. He may be disappointed in finding that what he acquired was less valuable than he expected, but he acquired all he bargained for, and there is no ground upon which a court of equity can give him anything more. On the contrary, in the latter case, the party had a complete right, by an existing contract, to something which, by mistake, he has failed to get. And this contract, and the right under it, still subsists in point of equity; because though the parties attempted to execute the contract, by mistake, they failed to execute it; and therefore a court of equity interposes, and upon the footing of an exist-

ing contract unexecuted proceeds to put the party in that condition to which his contract entitles him. And in this class of cases, I apprehend, it is wholly immaterial whether the party has failed to obtain that to which he was entitled through a mistake of fact or of law."

Substantially the same doctrine is laid down, following *Hunt v. Roussimire*, in *Pitcher v. Hennessy*, 48 N. Y. 415, holding where parties, to carry out their contract, agree to use an instrument which, by their mistake of the law, will not effectuate their intention, equity will not reform the instrument, or substitute another; but where parties intending to reduce a parol agreement to writing, and because they are ignorant of the force of language, and misunderstand the meaning of the terms used, make a contract different from that designed, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it. It matters not whether such a mistake be called one of law or of fact. This decision is in harmony with a recent one in Mississippi, *Sparks v. Pittman*, 51 Miss. 511, where it is held that the rule that equity will not relieve against mistakes of law, is not absolute. If a deed or instrument is executed, and by reason of misapprehension of its legal effect, fails to effectuate or conform to the agreement, a court of equity will relieve. To the same point see *Green v. Morris et al. R. R.*, 1 Beasley, 165; *Trigg v. Read*, 5 Humph. 529; *Freeman v. Curtis*, 51 Me. 140; *Evans v. Strobe*, 11 Ohio, 480; *Christie v. Sullivan*, 50 Cal. 337.

But a mistake as to the legal effect of an instrument, when a party knows its contents, and when it conforms to his agreement, will not ordinarily be a ground of relief: *Neff v. Raines*, 33 Wis. 689; *Gerald v. Elley*, 45 Iowa, 322; *Nellis v. Robertson*, 25 Vt. 603; *Kenyon v. Welty*, 20 Cal. 637. But where the mistake of law is occasioned by fraud, imposition, or misrepresentation, a party suffering thereby may be relieved in equity: *Ladd v. Rice*, 57 N. H. 374; *Brown v. Rice*, 28 Gratt. 467; *Hardigree v. Mitchum*, 51 Ala. 151; *Goodenow v. Ewer*, 16 Cal. 461; *Brown v. Armistead*, 6 Rand. 594; *Whelen's appeal*, 70 Pa. St. 410.

2. WHEN RELIED ON AS A DEFENSE.—The courts hold the doctrine strictly, that ignorance of the law cannot relieve one from the consequences of a crime, or from liability on a contract. The maxim, *ignorantia legis non excusat*, is in these cases fully and unexceptionally applied. So, promises made under knowledge of facts, as in the case of one who promises to pay a bill or note on which he is legally released, will be binding. See this point discussed in note to *Trimble v. Thorne*, 8 Am. Dec. 302; and see *Stowe v. Converse*, Id. 190; *Fisher v. May*, 5 Id. 626. The rule is now of frequent application in questions of estoppel. It was in a question of this nature it was applied in the principal case; and a useful inquiry arises as to the application of the rule in this class of cases.

The doctrine of *Storrs v. Barker* was afterwards considered in *Tilton v. Nelson*, 27 Barb. 595; and in the opinion by Emott, J., he says: "The question is presented whether ignorance of the law will prevent the application of the rule of equitable estoppel;" and referring to the decision in the principal case, he says, that when a party thus asserts his ignorance of his title to avoid an estoppel, he encounters two principles of law of general application: "The first of these principles is, that when a party procures, or even acquiesces in the disposition of his property by another, under color of title, and pretending to title, he shall be bound by such disposition, and shall be presumed to know the law so far as it is applicable to the case. The other is, that even if he shows that he was really ignorant of the law, and acted

in ignorance, still the maxim, *ignorantia legis neminem excusat*, will apply in favor of the other party."

In *Smith v. Cramer*, 39 Iowa, 413, one who pleaded a judgment in honest ignorance that it was void, was nevertheless held to be estopped from availing himself of a mistake of his legal rights. A strong case, holding the same doctrine, is *Maple v. Kusart*, 53 Pa. St. 348. There it appeared a husband and wife were seised of an estate by entireties. The husband, in his will, directed the land to be sold, and the proceeds to be divided among his wife and children. Having named no one to make the sale, the land was sold under an order of the orphans' court, and bought by two of the children, at the request of the widow, who received her share of the proceeds, in accordance with the will. After her death, in ejectment for the land by some of the heirs, it was held that they were estopped by her acts, and that the estoppel would operate notwithstanding she was ignorant of her legal rights. A somewhat similar decision was made in a more recent case: *Cox v. Rogers*, 77 Pa. St. 160. It appeared a testator made a certain legacy of personal property of a considerable amount to his wife, and then provided: "I do will to my son, his heirs and assigns, my farm, etc., subject to my wife's thirds." The farm, in fact, belonged solely to the wife; and he had therefore no right to dispose of it. She was held estopped to claim the farm, having accepted the provision in the will, with full knowledge of all the facts.

In *Rice v. Bunce*, 49 Mo. 231, an estoppel was set up against one although he was ignorant of his legal rights. So in *Mayer v. Ramsey*, 46 Tex. 371, on the authority of the principal case; as also in *Zollman v. Moore*, 21 Gratt. 313. In this last case, a widow joined with some of the children, adult heirs, in a suit against the other children, minors, and prayed that certain land be sold, and distribution made. In her bill she alleged she was entitled under the deed to her husband to one half of the land; and acting on this averment, a sale was made. Shortly afterwards, she discovered that she was entitled to the whole, and filed a bill of review. It was held that the mistake as to her rights was a mistake of law, against which equity would afford no relief. Staples, J., in his opinion, relied strongly on the principal case.

## HALE v. JAMES.

[6 JUNE, 1883.]

**DOWER ON ALIENATION.**—In case of alienation by the husband, the widow's dower is to be estimated according to the value of the land at the time of alienation.

**TIME OF ALIENATION.**—The husband mortgaged land without his wife joining, and continued in possession, and then released the equity of redemption to the mortgagee. The time of the release was held to be the period of alienation, when the value was to be taken without regard to any subsequent improvements made by the purchaser.

**CALCULATION OF ANNUITY IN LIEU OF DOWER.**—Where it is agreed that a yearly sum shall be allowed a widow instead of having dower assigned to her according to law, the interest of one third of the value of the premises, at the time of alienation, is the proper measure of the annuity; subject, however, to a reasonable deduction as a compensation to the tenant on account of necessary repairs and the risk of loss by fire, where a house and buildings constitute the principal part of the property.

**BILL** for assignment of dower. One Hale, on the eighth of July, 1814, mortgaged his house and lot to the defendant; his wife, the plaintiff, did not join in the mortgage. In March, 1817, Hale, then largely indebted, conveyed the premises to the defendant, in fee, for the consideration of twelve thousand five hundred dollars. The defendant took possession in May, 1819, and Hale died in September, 1821, leaving the plaintiff, his widow. The plaintiff filed her bill for dower, or that the defendant be decreed to pay her an adequate yearly sum, at such periods, and to be secured in such manner, as the court might direct.

The defendant, admitting the allegations of the bill, claimed that the yearly sum should be estimated according to the value of the premises at the death of the husband.

Witness testified as to the value of the premises in July, 1814, March, 1817, and September, 1821.

*P. J. Munro*, for the plaintiff.

*E. Wilkes*, for the defendant.

**KERR**, Chancellor. The main point in the case is, at what time the value of the premises is to be computed. The plaintiff contends that the value is to be estimated at the time of the alienation of the premises by her husband to the defendant by way of mortgage, on the eighth July, 1814; and if not at that time, then at the time of the release of the equity of redemption on the twenty-fourth March, 1817. The defendant insists that the value of the premises depreciated between the last period and the death of the husband, on the third September, 1821, and that the value ought to be taken as existing at his death.

It was declared by the supreme court in *Humphrey v. Phinney*, 2 Johns. 484, to be the rule of law, that the widow was not entitled to dower, according to the improved value of the land, in case of alienation by the husband, but must take her dower according to the value at the time of the alienation. [See, in point, *Van Doren v. Van Doren*, 4 Am. Dec. 408]. This was the old doctrine of the common law, and the case in the 17 H. III. is cited in Fitz. Ab. tit. Dower, sec. 192, for the rule that the wife shall have dower without the improvements made by the purchaser from the husband. So, in Perkins, tit. Dower, sec. 328, referring to the same place in Fitzherbert, it is stated that if the husband enfeoff a stranger, who improves and makes the land more valuable by the year, the wife shall not have her

dower "but according to the value it was in the time of the husband." Again, the rule is stated by Sir Matthew Hale to be, that the heir is not bound to warrant, except according to the value as it was "at the time of the feoffment," and a wife cannot recover against the feoffee more than he could recover in value against the heir: MS. of Sir Matthew Hale, cited by Mr. Hargrave, note 193, to Co. Lit. 32 a.

These old authorities refer to the time of the alienation by the husband, for the true period at which to estimate the value. There can be no doubt of the meaning of these cases; and if the land has, subsequently by improvements, increased in value, the wife cannot recover against the feoffee more than the value at the time of the feoffment, or at the time of the husband, because the feoffee cannot recover on his warranty more by way of indemnity against the heir. The rule is founded in sound policy, and does not discourage the purchaser from making improvements.

If the husband dies seised, the heir may assign the dower when he pleases; and if he neglects it and improves the land by cultivation or buildings before the assignment, it is his own voluntary act, with knowledge of his rights, and the widow takes the value in that case, as it is at the time of the assignment. The rule is fixed and steady, and whether the land be improved in value, or whether it be impaired in value, in the time of the heir, the endowment is still to be according to the value at the time of the assignment: Co. Lit. 32 a. And why should not the rule be equally fixed in the present case? The purchaser ought not to be exclusively entitled to his election, to take the time from the alienation, or from the husband's death, as may best suit his interest.

It would be very unreasonable to give that election to the purchaser, and deny any choice to the widow. The rule to be equal and just, must be mutual. If the purchaser is entitled to take the period of the husband's death, when the land has depreciated since his purchase, the widow ought to be entitled to take the same period, if the land has risen in value. It is not to be supposed that the period can be ambulatory at the choice of the purchaser, and that the widow shall have no choice in the case. But there is no color in the books for the suggestion that the time is unsettled, and depending on the volition of either party. It may suit the interest of the defendant to take the period of the husband's death, in this particular case, and perhaps in the very next case that arises, it might equally suit

his interest to take the period of the alienation, for the estimate of the value. The rules of law are, however, not subject to such alteration, and it is settled, from time immemorial, and on principles of justice and sound policy, that the value of the dower, in case of alienation by the husband, is to be taken at the time of the alienation, and not subsequently, and the rule is not to be disturbed to suit the views of one party.

It might possibly be made a question, whether the widow is entitled to the advantage of any increase in the value of the land by extrinsic causes, and not from actual improvements, or whether she was still to have one third of the rents, or one third of the land, or whether the quantity of each was to be reduced to the value at the time of alienation. Suppose a valuable mine of coal or ore, or a valuable spring of mineral or salt water should be discovered on the land, subsequent to the alienation, or suppose some revolution in commerce, or some great internal improvement, as the line of a canal for instance, should suddenly increase the land in the hands of the purchaser a hundred fold, would the widow take her dower at this increased value? I state these points, without giving any opinion upon them, for they do not arise in this case, and a very little reflection on the subject would teach us, that the rule as it stands, is the most favorable to the purchaser. Take one case with another, the land is more likely to increase than to diminish in value, because land is almost everywhere in this country in a state of rapid improvement, and the widow would be the gainer in most cases over the purchaser, if we had it in our power to dislocate the rule of computation, and transfer it from the time of alienation to the time of the husband's death.

The next question is, whether we are to take the date of the mortgage, or of the release of the equity of redemption, as the period of alienation, within the meaning of the rule. The husband in this case retained the possession until after the release of the equity; and a mortgagor in possession is regarded by this court as the owner of the estate, and as dying seised in respect to the dower of his wife, in case he dies before entry or foreclosure by the mortgagee. I have no difficulty, therefore, in taking the time of the release as the period of alienation, from which the value of the dower is to be computed.

Taking, then, the twenty-fourth of March, 1817, as the true period, the average value of the premises on that day may be estimated at seven thousand three hundred and thirty-three dollars, exclusive of the subsequent improvements. The inter-

est of one third of that sum is one hundred and seventy-one dollars and ten cents; and that would appear to be the proper assessment, if the defendant is to pay (as he assents to pay) an annuity, instead of submitting to an assignment of one third of the realty by metes and bounds. Why should not the interest upon the one third of the actual value of the premises at the time of alienation be the measure of the annuity? I do not know that there can be a more just and certain rule by which we can ascertain the amount of the annuity. When an estate is sold under a power in a will, or by order of this court, and the widow consents to join in the sale, and take the value of her dower out of the purchase-money, she takes either a gross sum, liquidated by the value of her life, according to the tables of life annuities, or she has the interest of one third of the purchase-money secured to her for life.

But it is suggested that there ought to be an abatement in the amount of the annuity, on account of necessary repairs, and the risk by the defendant of destruction, or the expense of the premium of insurance of the dwelling-house. Some deduction from the annual amount of the annuity would seem to be reasonable; for suppose that instead of the computation assented to in this case, the plaintiff had chosen to have part of the dwelling-house and yard assigned her, would she not have run the risk of loss of her enjoyment of the building by fire, and would she not have been responsible for permissive waste, and so far bound to contribute to reasonable reparations? The difficulty consists in ascertaining what ratable deduction ought to be made. There is no certain ratio to be prescribed. If one per cent. be deducted from the annuity, I should suppose it to be a reasonable and sufficient deduction. Instead of seven per cent. on the one third of the value, take six per cent., and that will reduce the annuity to one hundred and forty-six dollars and sixty-six cents. This leaves a yearly allowance of twenty-four dollars and forty-four cents for reparations and risk.

[The chancellor further considered the question of costs.]  
Decree accordingly.



# VAN BENSCHOOTEN v. LAWSON.

[6 Johns. Ch. 313.]

**COMPOUND INTEREST, WHEN ALLOWED.**—Compound interest can only be allowed on a special agreement in writing, after the lawful interest has become due. The agreement, to be valid, must be prospective in its operation, as that the interest then due and payable shall carry interest thereafter. An agreement made at the time of the original contract or loan, that interest shall begin and run upon the lawful interest from the period stipulated for its payment, is not valid.

**BILL of foreclosure.** It appeared that the bond and mortgage were given for the balance of two prior bonds; the one dated second of May, 1814, for four thousand seven hundred and fifty dollars, payable the first of May, 1815, with interest, and the other dated the twenty-seventh of May, 1817, for seven hundred and thirty-seven dollars, given for the arrears of interest on the prior bond. On giving this last bond, interest on the previous interest remaining unpaid, was calculated for the year it had remained due and unpaid, and was included, and which compound interest amounted to twenty-nine dollars and forty-two cents.

It appeared, also, that a judgment-bond was taken on the twenty-fourth of April, 1821, for certain arrears of interest on the bond and mortgage in suit, which included twenty-four dollars and eighty-seven cents, compound interest, on interest which had remained unpaid.

The material question considered was as to the liability for compound interest.

*J. Emott, for the plaintiffs.*

*B. Street, contra.*

**KERR, Chancellor.** It is a well settled rule, and for which I may refer to the case of *Connecticut v. Jackson*, 1 Johns. Ch. 13 [7 Am. Dec. 471], and to the authorities there cited, that compound interest cannot lawfully be demanded and taken, except upon a special agreement made after the interest has become due. It is then a debt due, and the creditor may insist upon immediate payment of it, or that the debtor should allow interest upon it, which is, in fact, turning the interest into principal. In the case of a mortgage security, it would be fair for the mortgagee, says Lord Chancellor Manners, 1 Ball. & B. 430, to call for interest due at the end of the year, and if not paid, to insist on its becoming principal; but if it constituted part of the

original agreement, it would be usurious and oppressive. The agreement in such cases is prospective in its operation, and that the interest then due and payable shall thereafter carry interest. Thus, in the case of *Thornhill v. Evans*, 2 Atk. 330, n. 1, Lord Hardwicke directed the master, in taking an account of what was due for principal and interest upon the mortgage, to inquire what arrears of interest were, from time to time, agreed in writing, to be turned into principal after such arrears became due, and such arrears to be considered as principal from the respective times of such agreement. In that case there was interest in arrear when the mortgage was paid off, and interest upon that interest was demanded by the creditor, which, says the lord chancellor, "was never allowed in a court of equity."

In the case before me, the agreement of the debtor to allow interest upon the arrears of interest was retrospective in its operation. It was agreed on the twenty-seventh of May, 1817, to allow interest for the year preceding, on the interest which was due the year preceding, and this cannot be permitted, nor such an agreement recognized and enforced in this court. Compound interest can only be admitted on the fact of a written agreement, made after the interest upon which the agreement operates has fallen due, and to give such an agreement a retrospective effect leads to oppression. It is equally objectionable as an agreement made at the time of the original contract or loan, that compound interest should begin and run upon the lawful interest the moment it falls due, whether payable yearly, half-yearly, or quarterly, and such agreements are held to be oppressive. To exact from the debtor interest on the previous arrears of interest without a previous special and particular agreement for that purpose, is inadmissible. It has no valid basis, nor any acknowledged legal consideration on which it can rest, if the previous agreement, made at or after the time the interest became due, be wanting. It is the agreement, and not the law nor the delay of payment, that will turn interest into principal. If the creditor was permitted to exact from the debtor a stipulation to pay interest on arrears of interest then due, it would lead to great and inevitable abuse. It would perhaps be less mischievous, because the parties would stand upon more equal terms, to allow of such a stipulation for compound interest, when the original contract is about to be made. The parties are then independent of each other; but in the other case, the debtor is comparatively dependent, and probably distressed, and the creditor exacts the stipulation under the evident

advantage of power and superiority. The agreement on the part of the defendant to pay compound interest retrospectively, does not alter the case, for the maxim *volenti non fit injuria* does not apply in these cases. In *Bosanquet v. Dashwood*, Cas. temp. Talbot, 37, usurious interest had been allowed and paid, yet the court decreed the creditor to refund it. Here is no money to be refunded. We are only to direct the master, in computing the amount due on the bond and mortgage, to give credit for the sum of twenty-nine dollars and forty-two cents as having been paid on the twenty-seventh of May, 1817, and the sum of twenty-four dollars and eighty-seven cents as having been paid on the twenty-fourth of April, 1821; and that those credits, with interest thereon, be deducted from the balance claimed to be due on the bond and mortgage. I shall direct that no costs be allowed, provided the sum to be reported due be paid within thirty days thereafter, and if not paid then, that the sale of the mortgaged premises be made under the usual decree, together with the costs of such sale.

Decree accordingly.

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In the note to *Selleck v. French*, 6 Am. Dec. 185, this subject is considered, and the principal case noticed.

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## GERMOND v. GERMOND.

[6 JOURN. OR. 347.]

**PROOF OF ADULTERY.**—Where an issue was directed to try the fact, on the allegation “that the defendant had committed adultery with one W. C. F., on or about the first day of April, 1816, in R. county,” the evidence must be confined to the specific charge put in issue; and evidence cannot be given of adultery committed with any other person than the one named, although the charges in the bill are general, that the defendant had “committed adultery at divers times, with W. C. F. and others, to the plaintiff unknown.”

**EVIDENCE NOT TO THE ISSUE.**—Where evidence was given at the trial of adultery committed by the defendant with other persons besides W. C. F., the verdict was set aside, and a new trial awarded, with leave to the plaintiff to amend the feigned issue.

**ALLEGATION OF ADULTERY.**—It is sufficient in a bill for divorce, for adultery, to charge the offense as having been committed with one or more persons unknown to the plaintiff.

**MOTION** for a new trial on a feigned issue, and that the issue be so amended as to confine the trial to the charge of adultery committed with one W. C. F., and to that fact alone. The bill

charged that the defendant, since her marriage with the plaintiff, had "committed adultery at divers times with William C. F., and others to the plaintiff unknown." And that on the first of April, at the house of the plaintiff, in Rensselaer county, the defendant committed adultery with the said W. C. F.; that in May and July, 1817, the defendant, at the house of the plaintiff, committed adultery with W. C. F.; that in April, 1818, the defendant abandoned the plaintiff and went to the city of New York, and resided in the family of J. G., and there committed adultery "with divers persons, whose names the plaintiff has not been able to discover," etc.

The answer denied all the charges of adultery.

The issue was joined on the following counts: 1. That the defendant had committed adultery with W. C. F. on or about the first of April, 1816, at the house of the plaintiff in Rensselaer county; 2. That the defendant had committed adultery with W. C. F. in Rensselaer county aforesaid, in May or July, 1817; and, 3. That the defendant had committed adultery between the first of April, 1818, and the first of August 1819, at the city of New York, "with certain persons whose names are not known."

A verdict was found that the defendant had committed adultery as charged with W. C. F., and with other persons.

*Buel and Van Vechten*, for the motion, read the defendant's affidavit, showing that she was surprised by evidence at the trial of adultery committed with other persons than W. C. F.; and denying that she ever committed adultery with B. D. or S. H., or with any other person; that S. H. had been dead for many years; that the testimony given by T. F. was false, etc. They cited 2 Johns. Ch. 224; 1 W. Bl. 298; 2 Vern. 240; 1 Ves. jun. 133, 134; 2 Atk. 319, 321; 9 Ves. 165, 169; Amb. 210, 324; Dickens, 576; 2 Madd. Ch. 267; 2 Ves. sen. 552; 2 Ves. jun. 287, 288.

*Vielie, contra*, cited 1 Johns. Cas. 25, 402; 2 Ves. jun. 288; 3 Mass. 391.

KENT, Chancellor. I see no good reason for disturbing the verdict, for any other cause than that the testimony was not warranted by the issue. The three counts in the feigned issue were, that the defendant had committed adultery in Rensselaer county with William C. F., and in the city of New York with certain persons whose names were unknown. But the evidence to sustain the verdict was, that the defendant had committed

adultery in Rensselaer county with another person and not with W. C. F., and so far it may be said that the defendant was taken by surprise, because she came to trial to defend herself only against a special charge of adultery, committed with F. in that county. This was the specific charge, upon the feigned issue, as it was drawn, and I am inclined to think the testimony ought to have been confined to a connection with F. in Rensselaer county, and that a latitude of inquiry as to other persons, not named, ought to have been confined to the city of New York, because the feigned issue so confined it.

The feigned issue was undoubtedly warranted by the charges in the bill, and I entertain no doubt that it is sufficient in a bill for a divorce, for adultery, to charge the offense as having been committed with one or more persons unknown to the plaintiff; and it would be very unreasonable, and lead in many cases to a lamentable failure of justice, to require the injured party to name the persons with whom the adultery was committed, when the fact might be unquestionable, and yet the name of the party unknown. The case of *Choate v. Choate*, 8 Mass. 391, is perfectly in point. That was the case of a libel for a divorce *a vinculo*, for adultery, and the court only required an averment that the names of the persons with whom the adultery was supposed to have been committed, and which were not mentioned in the libel, were unknown to the plaintiff. So even in an indictment for homicide, or other felony, if the name of the party murdered, or in respect to whom some other felony was committed, be unknown to the jurors, it may be so averred in the indictment, and the indictment will be good from the manifest necessity of the case: *Hawkins Pl. Cr. b. 2, c. 25, sec. 71; East Pl. Cr. tit. Homicide, c. 5, sec. 114.*

I think the feigned issue might have been framed consistently with the charge in the bill, so as to have enabled the plaintiff to have given testimony of adultery committed in Rensselaer county with other persons than the one specially named; for the first charge in the bill is general, without reference to any particular county, and states that "the defendant committed adultery at divers times with W. C. F. and others to your orator unknown." But the issue being framed differently, and in conformity with the more particular specifications in the bill, I think the plaintiff was bound, upon the trial, to confine himself to the specific charges in the issue, and to give testimony only as to them. If the issue had been more general, and without mentioning any particular individual, I am not prepared to

say that particular acts of adultery might not have been shown. The statute requires the adultery to be charged in the bill, but gives no directions as to any particular specification of the charge, and undoubtedly left that to the rules and practice of the court in like cases.

In *Sidney v. Sidney*, 3 P. Wms. 269, the wife sued the husband for a specific performance of marriage articles, and to have lands settled upon her for her jointure. He, in his answer, set forth that she had withdrawn herself from him and lived separately, and very much misbehaved herself. Proof of a criminal conversation with another man had been given, but Lord Talbot held that the crime for which the wife might have incurred a penalty, as the forfeiture of her dower, ought to be plainly laid to her charge, specified and put in issue, that she might know what to rest her defense upon. In that case, he said, the accusation was general and uncertain, and did not imply that she had been guilty of adultery, or eloped and gone away with an adulterer. Lord Hardwicke afterwards, 2 Atk. 338, cited this case for the purpose of showing that you must certainly make "a general charge of adultery" before you can go into proof of specific facts. He cited, also, the case of Lord and Lady Donerail, in 1735, in which she brought her bill for a separate maintenance, and the husband, in bar of the relief, stated in his answer that she did not behave with that duty and affection as became a virtuous woman, and gave proof of her adultery with one B. The depositions were admitted to be read in the chancery in Ireland; but upon appeal to the house of lords they were not admitted. He said a strong reason appeared upon the pleadings themselves for the rejection of the depositions, and brought the case to that of *Sidney v. Sidney*, because there was no express charge of adultery in the answer.

In *Watkyns v. Watkyns*, 2 Atk. 96, a bill was brought by the wife for maintenance; and the husband charged his wife, in the answer, that she behaved in a very indecent manner with one Cox; and this charge was adjudged sufficient to allow depositions to be read of a criminal conversation with Cox, and also with one Daws; for it was not necessary, as the lord chancellor observed, to make the charge in gross terms, but it was sufficient to know what is aimed at by the answer. In *Clarke v. Periam*, 2 Atk. 333, 337, Lord Hardwicke went more fully into the exposition of the rule of pleading on this subject. It was a bill to establish a bond given to secure an annuity to the plaintiff as *præmium pudicitiae*; and the defendant filed a cross-bill

upon that general charge, insisting that the plaintiff was a lewd woman, and a common prostitute; and the question was, whether the plaintiff in the cross-bill upon that general charge, was entitled to give proof of lewdness with a particular person. The chancellor thought it a question of great consequence to the rules and practice of the court, and took time to examine the authorities, and concluded that under such a general charge you might give particular evidence which was pointed, and applied to the general charge. All the cases were reviewed, and he stated the uniform sense of the determinations to be, that it was sufficient to put in issue a general charge of lewdness, and under that you might give particular evidence; for "if you was to allege in the bill that the woman was kept by a particular gentleman, or had criminal conversations with particular persons, the character of strangers might suffer, and bills would be stuffed with indecent matter and private scandal." Where the character is directly put in issue, you may go into evidence of particular facts; and he illustrated it by the case of an indictment for keeping a common bawdy-house, in which, though the charge be general, you may give in evidence particular facts. So, also, in the cases of a charge of drunkenness or lunacy.

I have gone into this examination of analogous cases to show that probably the better opinion is, that a charge of adultery need not specify the names of the persons with whom it was committed; and certainly it cannot and need not be required, if the persons are unknown when the bill is filed. But in this case, as the feigned issue specified a particular individual in the county of R., and had no general charge as to that county, I conclude that the plaintiff should be confined to that specific charge.

I shall accordingly set aside the verdict on account of the admission of evidence not warranted by the issue as it stood, and shall award a new trial, and allow the plaintiff to amend the feigned issue as he shall be advised.

Order accordingly.

## WILLIAMS v. STORRS.

[6 JOHN. CH. 383.]

**AGENT'S LIABILITY FOR MONEY RECEIVED.**—An attorney, or agent, who is authorized to sell land, and to collect money on a bond or mortgage, should keep the money received, ready to be paid over to the party entitled to it. He is not liable for interest on the moneys of his principal, unless in default, or unless he has made use of the money for his own profit.

**DEMAND OF MONEY DUE INFANTS.**—A father of infant plaintiffs, as such, has no right to demand the money of the infants; and where they reside out of the state a guardian should be appointed in order to make a valid demand. Nor has an administrator, appointed in another state, any authority.

**BILL for an accounting.** The material facts appear from the opinion.

*Van Vechten*, for plaintiff.

*Storrs*, in person, and *S. Jones*, contra.

**KENT, Chancellor.** The only question is, whether the defendant, Storrs, shall be charged with interest on the sums admitted by him in his answer to have been received.

On the nineteenth of June, 1811, Arthur Magill employed him by letter, and put into his hands a mortgage, executed by William Jenks and assigned by the mortgagee, to Magill, which the defendant S. was directed to put in suit, and if the land should not sell for money enough to pay the debt, Magill requested the defendant to buy in the land for Magill, and to sell it, payable partly in cash and partly on credit by installments, secured by a mortgage. Magill likewise requested the defendant to sell for him one hundred and twenty-nine acres of other land, on credit and security. These were the outlines of the instruction, but the letter concluded by leaving "the whole management" to the defendant. The defendant states that he did not deem it prudent to go on and enforce a sale of the mortgage by foreclosing the equity of redemption, but judged it best to give time and indulgence to the mortgagor, as being most for the interest of Magill; and in the autumn of 1811 he communicated these facts to Magill, who resided at Middletown, in the state of Connecticut, and from whom he never heard again on the subject. Magill died on the seventh of February, 1812, and on the twentieth of that month, and before the defendant had heard of his death, he received of Jenks fifty dollars; two other sums, of one hundred dollars, and fifty dollars, were paid



by Jenks to the defendant in 1814 and 1816, and which were received in the absence of the defendant from his office, and on behalf of the lawful representatives of Magill who might be entitled thereto. A son of Magill administered on his estate by letters of administration taken out in Connecticut; but no administration was granted under the authority of this state. The defendant, in April, 1818, contracted to sell forty acres of the one hundred and twenty-nine acres to the defendant Felshaw, and he received part of the payment then, and the residue in 1814, amounting in the whole to two hundred and thirteen dollars and sixty-two cents. He continued to act as agent in respect to those lands and the mortgage interest, under the advice of the son and administrator of Magill.

In the distribution of the estate of Magill, the mortgage of Jenks, and the one hundred and twenty-nine acres of land, were set off by the court of probates in Connecticut, to the widow of Magill, but she dying in December, 1812, that property was, afterwards in the autumn of 1818, set off by the same court, to the four plaintiffs, who are infants. The defendant S. advised the father of the four infants to be duly appointed, under the authority of this state, their guardian, and he did not deem it safe to pay those moneys, so received, either to the father of the infants, or to the son and administrator of Magill, because the one was not a duly constituted guardian, nor the other an administrator under the authority of this state. He admits, that the son and administrator drew an order on him, dated sixteenth of October, 1820, for all the moneys so received, and that he refused to pay for want of due authority in the drawer, or to pay interest in any event.

The father of the infant plaintiffs was not entitled, in his relation of father, to demand the infant's money in the hands of the defendant, and it was requisite that a guardian should have been appointed here, to be enabled to make a valid demand: *Genet v. Thilmadge*, 1 Johns. Ch. 3; *Morrell v. Dickey*, Id. 153. It is equally well settled, that an administrator of an intestate's estate, where letters of administration were granted out of the estate, has no legal authority over the intestate's effects within this state. All his power over the estate is derived from the court that appoints him, and the appointment does not operate and is not recognized out of the jurisdiction of that court. The order of the administrator in Connecticut was not binding, and could not have been enforced here, and the defendant was not under any obligation in law to obey it, though I apprehend a

voluntary payment under it, would have protected him. The cases on this point were reviewed in the case of *Morrell v. Dickey*.

There was not, then, *stricto jure*, any default on the part of the defendant, in refusing to pay to persons not having authority to demand. He received the money, not strictly as a trustee in confidence and without interest, but as an attorney or agent, or bailiff, instructed to cause the land to be sold, in his discretion, and to collect and receive the money. It was sufficient, if he kept the money safely, and paid it according to the request of the party entitled to demand and receive. His duty was to be ready to pay upon demand, and I think it would be too rigorous a doctrine, unless under very special circumstances, which do not exist in this case, to exact from an attorney, or agent, interest upon the moneys of their principal in hand, when they are not chargeable with any default, and are ready to pay when called upon for that purpose. If the agent had received moneys, and neglected for a long time, to inform his principal of the fact, and willfully suffered him to remain in ignorance, that the debtor had paid to the agent, there would be equity in requiring the agent to pay interest, for here would be a case of default, and breach of duty. But there is no averment in the present case of a want of notice, and therefore none is to be presumed. So, if the agent had employed the money for the purposes of gain to himself, a ground might be laid for a charge of interest, and the question is, whether the admissions in the answer will warrant that conclusion. The defendant says he received the moneys as agent of the representatives of Magill, and that, as the money was received from time to time, it was indiscriminately placed with his other moneys, received as attorney or agent, and not set apart or preserved separately from the mass of his funds. That since 1812, there has passed through his hands, probably thirty thousand dollars of moneys collected and received from others, as an attorney or agent, and that the moneys in question were received as he customarily receives all moneys passing through his hands, and of which no separate deposits or accounts are made or kept. That the moneys were paid away out of the general mass of moneys in his hands in the course of his payments, either as moneys collected, or on his general expenditures, on his own account. He denies, however, that the same were laid out, or invested, or used in any operation of profit or speculation, or put at interest, or to any productive use whatso-

ever, and he says that he has ever been ready to account when properly called upon for the moneys received, and is now ready to account and pay.

Upon these facts, I do not think the defendant can be made chargeable with any profit made out of the moneys he so received, nor with any breach of duty in not paying before he was authoritatively called upon to pay, and therefore he ought not to be chargeable with interest. I shall, accordingly, so far correct the decree recently pronounced in this cause as to exempt the defendant S. from interest on the four hundred and thirteen dollars and sixty-two cents, which he received in the course of his agency, and also for the payment of costs.

Decree accordingly.

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The statement of the chancellor that a voluntary payment by a debtor in one state to an administrator appointed in another state would be good, was shown not to be involved in this case in *Parsons v. Lyman*, 20 N. Y. 103. In *Schultz v. Pulver*, 11 Wend. 363, however, an administrator appointed by the surrogate of Columbia county was compelled to account for, and was charged with the amount of a debt owing to, his testator by a solvent debtor residing in Pennsylvania, on account of a neglect to use due diligence in obtaining payment.

In several cases already appearing in the volumes of this series, this subject has been examined. In *Goodwin v. Jones*, 3 Am. Dec. 173, Parsons, C. J., held that a foreign administrator could not sue or defend elsewhere. So in Connecticut, *Riley v. Riley*, Id. 260.

In Story on Conflict of Laws, sec. 515, the law is thus stated: "But although an executor or administrator is not entitled to maintain a suit in a foreign court, in virtue of his original letters of administration, yet it has been said that if a debtor chooses voluntarily there to pay him a debt which he may lawfully receive under that administration, the debtor will be discharged."

In *Leonard v. Putnam*, 51 N. H. 247; S. C., 12 Am. Rep. 106, where a plaintiff, an infant, brought suit by his guardian appointed in another state against the administrator of his father. It was held that the rights and powers of guardians do not extend over the persons and property of their wards in other states; and that the domicile of the deceased is the place of primary and exclusive probate jurisdiction in the settlement of his estate. The right of a foreign administrator or executor was here discussed; and the case is therefore instructive in this connection.

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## CHAMPION v. BROWN.

[6 JOHN. CH. 396.]

**CONTRACT FOR SALE OF LAND—RIGHT OF HEIRS.**—When a contract is made for the purchase of land, it descends to the heirs of the vendee as real estate; and they have a right to demand the discharge of the contract by the administrators out of the personal estate.

**ASSIGNMENT OF CONTRACT BY ADMINISTRATORS.**—The administrators of the vendee in a contract for the sale of land can not assign the contract, nor compel its performance, without the consent of the heirs.

**VENDOR'S RIGHT IN CASE OF ASSIGNMENT.**—Where the vendee assigns the contract, and the assignee takes possession of the land, the vendor, though he has no right of action against the assignee for the purchase-money, may, however, by virtue of his lien on the land, call upon him to pay the money, or to surrender the land, or to have it sold in satisfaction of the lien.

**SPECIFIC PERFORMANCE OF INDEMNITY.**—When administrators make an agreement with one to whom a contract is assigned, that he shall indemnify and save them harmless, etc.; the administrators are entitled to a specific performance of the covenant; and a want of personal estates cannot be set up against the relief sought.

**BILL for specific performance.** The bill was filed by Henry Champion, and William L. Storrs, and the administrators and heirs of John Paddock, deceased, against the defendants for the specific performance of a contract, made the twenty-ninth of August, 1816, by which Henry C., and Lemuel Storrs agreed to sell and convey to Paddock, 952 acres of land, etc., for the sum of eight thousand dollars, five hundred to be paid in cash, and the residue in six annual installments, with interest annually.

Paddock died intestate, November sixteen, 1816, and his administrators and heirs being unable to perform the contract for want of personal assets, on the first of June, 1818, entered into an agreement with the defendants, by which these covenanted and agreed "that they would take up and cancel" the contract between C. & S. and Paddock, by the first of August, following, or in case Champion, the survivor of Storrs, should refuse to give up and cancel the said contract, then the defendants covenanted to indemnify and save harmless the administrators of P. from all damages, etc., they might sustain. The administrators of P. covenanted in their individual capacities to pay to the defendants all moneys owing to them from the deceased, stating how the payments were to be made; and they were to allow as part payment, the five hundred dollars paid by Paddock to C. & S., "also the amount of the improvements appraised by Loomis and Lord." At the time of this agreement the administrators assigned the contract to the defendants. L. Storrs died intestate, and in the settlement of his estate, all his interest in the contract became vested in the plaintiff William L. Storrs. Soon after the agreement between the defendants and the administrators, the former entered and took possession of the land, and have since continued in pos-

session, exercising acts of ownership. They made no payments, nor did they take up the contract as agreed; but the representatives of P. were still liable thereon.

The bill prayed for discovery and specific performance. The defendants demurred as to a discovery, and as to specific performance on the following grounds: Because it did not appear that there was any privity between the plaintiffs or either of them, and the defendants, or between the defendants and Champion and L. Storrs; and because it did not appear that the administrators of P. had any power to sell or assign the contract, or the land described in it; and because the plaintiffs did not make out a case for relief.

*N. Williams, and D. Cady*, in support of demurrer.

*Henry*, *contra*.

Kerr, Chancellor. 1. The first leading question is, whether the bill can be sustained by Champion and Storrs, as vendors, against the defendants, claiming by purchase under the vendee. The title in law never passed out of the vendors, though in equity, by virtue of their agreement to sell, the estate was in the vendee, and was in him transmissible by descent, and devisable by will.

The covenant on the part of the defendants was in the alternative; it was, that they would take and cancel the contract that Paddock had made with the vendors, by the first day of August thereafter; or in case of the refusal of C. and S. to give up and cancel it, they would indemnify and save harmless the administrators of P. from all damages and costs to arise by reason of his covenants.

The bill does not state, distinctly and affirmatively, any specific breach of these covenants on the part of the defendants. It may be inferred from the bill that C. and S. refused to give up their contract with P., because the bill is silent on the subject of demand, and consent or refusal, and claims a specific performance of that contract.

There is no breach assigned as to this part of the alternative, and it is not averred that the administrators have sustained any damage from the breach of the covenants of their intestate. There has been no demand made upon them, or suit brought against them for non-payment of the installments. Such a suit would have been useless if another averment in the bill be true, which is, that there are no assets, real or personal, by which they could be enabled to perform the covenants of Paddock.

The defendants purchased the contract from the administrators of P., after non-payment of the first installment, and before the second installment became due; and they took possession of the land, and have exercised various acts of ownership over it and made great havoc of the timber, but have made no payments on the first contract, or taken it up. The prayer of the bill is, that they be decreed to perform Paddock's contract, according to their covenant with his administrators.

But strictly, and in terms, they have not broken their covenants with the administrators, and the only ground upon which, as it appears to me, that the bill can be sustained on the part of the plaintiffs C. and S. is, that the defendants took the land subject to the lien that the vendors had upon it, under the contract with Paddock. It is not to be supposed that C. and S. can sustain the bill on the personal covenants from P. to them. There was no privity or communication between C. and S. and the defendants. The latter are under no personal engagement to the vendors, and if they are liable to C. and S., it is only in respect to the estate in their possession.

I do not perceive the authority under which the administrators assigned the contract of P., and it may be doubted whether the defendants were entitled to fulfill the original contract, and could compel a deed from C. and S. without the valid assent of the heirs of P., to whom the benefit of his contract belonged. In equity, the land contracted for descended to them as real estate, and they were entitled to call upon the administrators to discharge the contract out of the proceeds of the personal estate, if any there were, so as to enable the heirs to demand and receive a deed. But admitting the contract to have been duly assigned, the vendors could not have compelled the defendants to have paid the money. In this sense, they could not have exacted from them a specific performance of the contract of P. But I think they were entitled, by virtue of their lien, to call upon the defendants as assignees of the contract of the vendee, to pay up the purchase-money, or surrender up the land, or have it sold for the benefit of the vendors, and perhaps to account for the intermediate rents and profits, and the waste committed.

The remedy by the vendor, against the assignee, may be said to be *in rem*, rather than *in personam*. This is the case when the suit is by the vendee against a purchaser from the vendor.

It is well settled, that if A. enters into a contract to sell land to B., and afterwards refuses to perform his contract, and sells

the land to C. for a valuable consideration, B. may by bill, compel the purchaser to convey to him, provided he be chargeable with notice, at the time of his purchase, of B.'s equitable title under the agreement. Lord Macclesfield, in *Atcherly v. Vernon*, 10 Mod. 518: *Winged v. Lofebury*, 2 Eq. Cas. Ab. 32, pl. 43; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Daniels v. Davison*, 16 Id. 249; 17 Id. 433, S. C. The rule that affects the purchaser is just as plain as that which would entitle the vendee to a specific performance against the vendor. If he be a purchaser, with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. The purchaser from the vendor takes the estate subject to the charge, and so, I apprehend, does a purchaser from the vendee, and he is equally responsible in respect to the estate. The vendor cannot make him personally liable for the purchase-money, but the estate is liable, and if he be a purchaser with notice, it is the same thing whether the estate had or had not been actually conveyed by the vendor.

It was said in *Green v. Smith*, 1 Atk. 572, and had been so held long before in *Davie v. Beardsham*, 1 Ch. Cas. 39, that from the time of a contract for the sale of land, the vendor as to the land, is considered a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor. A bill will lie by the vendor for the purchase-money, or for the balance that may remain due, because the vendor has a lien upon the land for the purchase-money. In *Mackreth v. Symmons*, 15 Ves. 329, Lord Eldon said that the vendor's lien for the purchase-money unpaid, existed subject to certain exceptions, not only against the vendee, but against purchasers with notice, claiming under the vendee.

The inference which he drew from a review of the authorities was, that in those general cases, in which there would be a lien as between the vendor and vendee, the vendor will have the lien against a third person who had notice that the money was not paid. That point seemed to be clearly settled; and he should have had no difficulty, he said, in deciding it upon principle without authority, as he could not perceive the difference between that species of a lien and other equities, by which third persons having notice are bound. In the cases already referred to, the vendor had parted with the title, but whether he had or had not, makes no difference in the principle, and the vendor's lien is certainly not impaired by withholding the conveyance. In *Pollexfen v. Moorc*, 3 Atk. 272, the conveyance was exe-

cut, but retained by the vendor as a security for the residue of the purchase-money. The vendee, who had taken possession, and paid part of the purchase-money, died, and the estate was held liable in the hands of the heir of the devisee of the vendee, for the remainder of the purchase-money, by virtue of the vendor's equitable lien. A *dictum* in that case has produced a good deal of perplexity, and the case has been generally complained of as badly reported. Lord H. said that the vendee "was a trustee as to the money for the vendor, but this equity will not extend to a third person, but is only confined to the vendor and vendee." But it is not the meaning of the passage that the lien does not exist when the estate passes into the hands of a third person with notice that the money was not paid. The subsequent decision of Lord Hardwicke, in *Walker v. Besnickete*, 2 Ves. 622, contradicts that construction and in that very case of *Pollexfen v. Moore*, the lien was extended to meet the equities arising between the representatives of the real and personal estate. So it was also in *Trimmer v. Bayne*, 9 Ves. 209, and there the land had been contracted to be sold, but not conveyed in the life-time of the vendee.

The case of *Smith v. Hibbard*, Dickens, 730, is quite analogous on that point to the one before me. A. contracted to sell an estate, and received part of the purchase-money, and delivered possession, and both the vendor and purchaser died before the contract was completed. A bill was filed against the devisees and executors of the purchaser to have the contract performed, and the residue of the purchase-money paid out of the personal estate of the deceased, and if not sufficient to have the deficiency raised by a sale of the real estate, on which the money contracted to be paid, remained a specific lien. The opinion of Lord Thurlow was in favor of the claim as stated, and he decreed accordingly.

There can be no doubt, then, I apprehend that the plaintiffs, C. and S., by virtue of their lien upon the estate, are entitled to have the estate sold, and, possibly, they may be entitled to the re-delivery of the possession, with an account of the intermediate profits and waste, though as to that point I have not as yet formed an opinion, but if it was intended to charge the defendants personally with the contract of Paddock, and to make them pay the money at all events, the plaintiffs, C. and S., have not entitled themselves to such a remedy, and they can only charge the defendants in respect to the estate, and not upon the foot of a personal contract with P. to which the defendants



were not parties. As against the representatives of P., they may require the payment of the money under his personal contract, but the assignee is only responsible to the plaintiffs, C. and S., on the privity of estate, and the precise extent of that responsibility may properly be left for future consideration.

2. The next question in the case is, whether the plaintiffs, who are administrators of Paddock, are entitled to any remedy under this bill, upon the covenant of indemnity.

The administrators are not personally liable on the contract of their intestate; and as they have averred they have no assets, it is not perceived how they can be injured; and this assertion of theirs creates the great difficulty on the point.

There are cases to show that equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the court entertains bills *quia timet*. The administrators are, no doubt, entitled to compel the defendants, by bill, to perform their covenant.

Thus, in *Ranelagh v. Hayes*, 1 Vern. 189; 2 Ch. Cases, 146, S. C., R. assigned several shares of the excise to H., who covenanted to indemnify and save R. harmless from all debts, accounts, covenants and demands whatsoever, by reason of any of the covenants or agreements entered into by R., and contained in the letters-patent, etc. R., being sued by the king, filed his bill against H., and prayed for a performance of the agreement in specie, alleging that the defendant wholly refused to perform the covenants on his part, but in breach thereof, permitted R. to be sued by the king. It was not charged or proved that any rent was actually in arrears, and the defendant objected to the suit as being founded on a personal covenant of indemnity, which sounded only in damages, and for which the plaintiff had his remedy at law. But Lord Keeper North decreed a specific performance, and directed a reference to a master to tax the damages, and that as often as any breach should happen, he should report the same specially to the court, and that H. ought to be decreed to clear R. from all these suits and incumbrances within the reasonable time of a year. He compared the case to that of a surety in a bond, who though not molested for the debt, yet after the money is payable the court will decree the principal to discharge it, it being unreasonable that a surety should always have such a cloud hanging over him.

Sir Joseph Jekyll, the master of the rolls, in *Lee v. Rook*, Mosely, 318, made a similar observation in respect to the rights

of a surety. "If I borrow money," says he, "on the mortgage of my estate for another, I may come into equity as every surety may against his principal, to have my estate disincumbered by him, and the covenant in the mortgage deed to pay the money will bind the principal, for the money being borrowed for him, it is his debt, and the surety is only a nominal person." And why may not the administrators come into this court, and call upon the defendants to clear the estate of P. from the covenants of P. to C. and S.?

There are many other cases, besides the one already cited, in which chancery has sustained bills for a specific performance of personal covenants, sounding in damages, and which had no concern with real estate. The case of *Ward v. The Duke of Buckingham*, cited by Lord Hardwicke, and again by Lord Eldon, 3 Atk. 385; 10 Vesey, 161, may be referred to as an instance; and Lord Hardwicke held in *Buxton v. Lister*, 3 Atk. 383, that a bill could be entertained by the vendor for the specific performance of an agreement for the sale of wood. But in cases relating to the realty, the jurisdiction is much more freely exercised, and Lord Hardwicke took notice of a marked distinction between the two cases. In *Pember v. Mather*, 1 Bro. 52, Lord Thurlow sustained a bill, by the seller against the assignee of a lease, for a specific performance of an agreement to indemnify, and to execute a bond to secure the indemnity. In the case before me, the defendants by their covenant of indemnity, and purchase of the contract between C. and S. and P., undertook to relieve the estate of P. from the burden of that contract. This is the true intent and meaning of the agreement; and it is as just that they should be decreed to clear the representatives of P. from the charge which they assumed for them, as it is that a principal debtor should exonerate his surety before he is sued, and not leave "a cloud always hanging over him."

The suggestion of a failure of assets is not sufficient to defeat the suit *in limine*. There has been no account of the assets stated, and perhaps there may have been a waste of assets to the extent of the money coming to C. and S., and for which the representatives of P. might be responsible, in case C. and S. were to proceed *ex rigore* against them. Part of the assets, to near two thousand dollars, were applied to discharge a debt from the intestate to the defendants, and the application of the assets to that debt was part and parcel and a condition of this very covenant of indemnity. There may be assets which have

not yet been reduced to possession. The very assets so paid to the defendants might have been applied in part performance of the contract of P., if this contract of the defendants had not intervened. We cannot know the state of the assets until an account has been taken; and the real and personal representatives of P. are certainly liable to be sued, and to be required to render an account to C. and S. of the assets received. The defendants are not entitled to set up the want of assets, at least in this stage of the cause, as an objection to a performance of their covenant; and it strikes me, at least, as a very inequitable defense. But I am not required, nor am I ready to give any opinion, at present, on the extent of the damages which can or ought to be assessed upon the covenant of indemnity. It is sufficient to say that the administrators are entitled to their bill for a specific performance of the covenant of the defendants, and that the remedy in this court seems to be appropriate, under the particular circumstances of this case, and that there is enough stated in the bill to call upon the defendants to answer.

The bill does allege, in substance, that the administrators sold or assigned the contract, with certain improvements, which had been assessed, and that the defendants assumed to pay for these improvements, and also to refund to the administrators the payment of the five hundred dollars, which had been paid by P. on his contract with C. and S.

These facts appear in this manner: By the contract with the defendants, the administrators were to pay certain debts due from P. to the defendants and "as part payment the amount of money paid by P. to C. and S., and indorsed on their contract; also, the account of the improvements as appraised by Loomis and Lord," were to be allowed. The agreement is blindly worded as to these payments, but it must of necessity mean, that they were to be allowed by the defendants in part payment of what the administrators were to pay them. The bill gives this construction, and is, for the present, to be assumed as true.

It states that the administrators accounted with the defendants, and that, on such accounting there was found to be due them two thousand eight hundred and eighty-five dollars and two cents, which the administrators paid partly by cash, partly by a bond and mortgage, partly by obtaining credit on the above sum, for moneys paid by P. on his contract, and for the amount of the improvements as

appraised by Lord. Here then it appears that the defendants took possession of improvements on the land made by P. and the assessment and allowance, mentioned in the bill, can have no other meaning. They also refunded to the administrators the moneys which the intestate had paid upon his contract with C. and S. This fact taken in connection with their possession and use of the land, and dealing with it as owners, is decisive to prove that the defendants intended to stand in the place of P. and to assume the payments to C. and S., with which his estate stood charged.

This is the good sense and meaning of their covenant of indemnity. If they meant (and which I cannot and do not suppose) to go on the land and use it as their own, make contracts for the sale of it, and strip it of its timber, and then abandon it, without any payment, under the pretext, that if the administrators had no assets, and which the bill avers, and the demurrer admits the defendants knew when they made the contract, they then could sustain no damage, and therefore, they, the defendants, were not liable under their covenants, then they undoubtedly must have meditated a fraud, and that alone is sufficient to give jurisdiction, and to sustain the bill for relief. But as we ought not, in justice to the character of the defendants, to admit this to have been their intention, the other construction becomes necessary, and must be taken to be well founded.

3. It is also stated as a cause of demurrer that the heirs of Paddock are parties without showing any right or title to discovery or relief. But they have an interest in the subject-matter in controversy, and ought to be before the court, either as plaintiffs or defendants in order that their interest may be properly protected. In equity, the lands in question descended to them as heirs and the administrators had no right to assign away that interest; but if it be for the benefit of the heirs, being infants, they may be directed to convey their interest to the defendants, and this they offer to do by the bill, and this the court is competent to authorize and direct.

I shall, accordingly, declare that upon the face of the bill, the plaintiffs C. and S. have a lien upon the lands for the purchase-money, and are entitled to call on the defendants as assignees of P. to pay it, or that the lands, with the immediate rents and profits thereof, in their hands, be made responsible for the same; and that the plaintiffs, who are administrators, are upon the facts stated in the bill entitled to a specific per-

formance of the covenants on the part of the defendants, and to an assessment of damages for breach thereof; and that the plaintiffs, who are infants, have an interest in the lands as heirs of P., and are necessary parties for the purpose of having their interest disposed of under the direction of the court, as equity and their benefit shall dictate. It is thereupon ordered that the demurrer be overruled, and the question of costs thereon reserved, and that the defendants answer the bill in six weeks, etc.

Order accordingly.

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### **LIVINGSTON v. LIVINGSTON.**

[6 JOHN. CH. 497.]

**INJUNCTION AGAINST TRESPASS.**—Injunctions may be granted to prevent trespasses, as well as against waste, where the mischief would be irreparable, and to avoid a multiplicity of suits.

**BILL** for injunction, which stated that the plaintiff was seised of a tract of land in the manor of Livingston; that the defendant's tenants, had entered upon plaintiff's land and cut wood and timber under a claim of right.

The material question submitted was, whether an injunction could issue against such waste.

*E. Williams*, for plaintiff.

Counsel for defendant, do not appear.

**KENT**, Chancellor. This is not the case of a stranger entering upon the land as a trespasser, without pretense of right, and cutting down timber. In such a case, Lord Thurlow, in *Mogg v. Mogg*, Dickens, 670, refused to interfere by injunction. This is analogous to a case before Lord Camden, referred to by the counsel in *Mogg v. Mogg*, and which Lord Thurlow seemed to approve of. It was where a defendant claimed a right to estovers, and under that right cut down timber; there was a claim of right, and until it was determined, it was proper to stay the party from doing an act which if it turned out he had no right to do, would be irreparable. So, also, in *Harrison v. Gardiner*, 7 Ves. 305, the injunction was granted where the defendant claimed common of pasture and estovers; and in that case Lord Eldon observed that the law as to injunctions had changed very much, and that they had been granted much more liberally than formerly. They were granted in trespass, when the mischief would be irreparable, and to prevent a multiplication of suits.

In *Mitchell v. Dorrs*, 6 Ves. 147, the defendant, in the process of taking coal had begun to work into the land of the plaintiff, and though this was strictly a trespass, yet the injunction was granted, because irreparable mischief would be the consequence if the defendant went on. In *Hamilton v. Worsfold* and in *Courthope v. Mapplesden*, 10 Ves. 290 and note *id.*, injunctions were granted against a trespasser entering with permission, or by collusion with the tenant, and cutting timber.

Lord Eldon repeatedly suggested the propriety of extending the injunction to trespass as well as waste, and on the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance. The distinction on this point between waste and trespass, which was so carefully kept up during the time of Lord Hardwicke, was shaken by Lord Thurlow in *Flamang's case*, respecting a mine, and seems to be almost broken down and discarded by Lord Eldon. This protection is now granted in the case of timber, coals, lead ore, quarries, etc.; and "the present established course," as he observed in *Thomas v. Oakley*, 18 Ves. 184, "was to sustain the bill for the purpose of injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages." The injunction was granted in *Crockford v. Alexander*, 15 Ves. 138, against cutting timber, when the defendant had got possession under articles for a purchase; and in *Tworl v. Tworl*, 16 Ves. 128, against cutting timber between tenants in common; and in *Kender v. Jones*, 17 Ves. 110, where the title to boundary was disputed; and in the case of *Earl Cowper v. Baker*, *Id.* 128, against taking stones of a peculiar and valuable quality at the bottom of the sea, within the limits of a manor; and in *Gray v. Duke of Northumberland*, *Id.* 281, against digging coal upon the estate of the plaintiff; and in *Thomas v. Oakley*, *ubi supra*, against exceeding a limited right to enter and take stones from a quarry. In all these cases the injury was considered a trespass, and in two of them it was strictly so; and the principle of the jurisdiction was to preserve the estate from destruction. But I can safely allow the injunction in the present case, without going to the extent of these latter cases, or following the habit, as Lord Eldon termed it in *Field v. Beaumont*, 1 Swanston, 208, of the English chancery, in granting injunctions in cases of trespass as well as of waste. Here has been one action of law, in which the claim of the defendant to estovers in the lands of the plaintiff has received a decision against him, and there is another

suit at law still depending, in which the same question arises. It is just, and necessary to prevent multiplicity of suits, that the further disturbance of the freehold should be prevented until the right is settled, and the case decided by Lord Camden is a sufficient authority for the interposition asked for in this case.

The recent decision by the vice-chancellor in *Garstin v. Aspin*, 1 Madd. Ch. 150, shows that it is not a general rule, that an injunction will lie in a naked case of trespass, where there is no privity of title, and where there is a legal remedy for the intrusion.

There must be something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy.

**Injunction granted.**

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEW JERSEY.**

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**ARNOLD v. MUNDY.**

[1 HALSTED, 1.]

**NAVIGABLE WATERS, RIGHT TO.**—Navigable rivers, in which the tide ebbs and flows, ports, bays and sea coasts within the boundaries of a state, and rights of fishery annexed thereto, belong to the people in their sovereign capacity, for the common use of all the inhabitants.

**BOUNDING LAND ON STREAM.**—A grant of land bounded on a river in which the tide neither ebbs nor flows extends *ad flum aquae*, but a grant bounded on a navigable river extends to high-water mark only.

**PROPERTY IN OYSTER BEDS.**—One who plants oysters in the bed of a navigable river, below low-water mark, has not such a property therein that he can maintain trespass against a person taking them away, although he owns the adjacent shore.

**TRESPASS** for breaking the close of the plaintiff, situated in Perth Amboy, and taking his oysters, etc. On the trial the plaintiff deduced title: 1. Under surveys to Peter Sonmans, dated twenty-eighth March, 1689-90, and twentieth January, 1685, to the river opposite the oystery, and deduced title down to himself; and, 2. Under a survey dated eighth April, 1818, for the land where the oysters were planted, and showed a number of grants of fisheries and beds of navigable rivers by the proprietors, both before and after the surrender.

The plaintiff proved that Coddington, from whom he purchased the farm, had staked off the oyster beds in dispute in front of his farm, near thirty years ago; that he claimed the exclusive right to the enjoyment of the oysters, and attempted and did drive people off who came under a claim of common right.

After the plaintiff purchased he bought oysters, and planted them on the beds, and staked them off. It appeared that he



was at considerable expense in planting, and bought several boat loads, and claimed an exclusive right as far as he had planted. The staking occasioned no injury to the navigation. The bed from which the oysters were taken was bare at very low tides, but was below the ordinary low-water mark. After the survey of 1818 the defendant came, at the head of a small fleet of skiffs, and took away these oysters, avowedly to try the right.

The defendant pleaded not guilty, and gave notice that the *locus in quo* was a public navigable river, in which the tide flows and reflows, in which oysters grow naturally, and that all the citizens of the state had a common right to take oysters therein.

A nonsuit was granted, and a rule to show cause why it should not be set aside was granted.

*Wall*, in support of the motion.

*Wood*, *contra*.

KIRKPATRICK, C. J. This is an action of trespass for entering upon the plaintiff's oyster bed in the mouth of the Raritan, at Perth Amboy, and taking and carrying away his oysters there planted. It was brought to trial at the Middlesex circuit, in December last, when, upon the case made out, the plaintiff was nonsuited; and upon coming in of the *postea* there was a rule to show cause why that nonsuit should not be set aside and a new trial granted.

It appeared in evidence, upon the trial, that the plaintiff, on the fourteenth of February, 1814, had purchased in, and at the time of the supposed trespass, was in possession of, a certain farm, commonly called Nevill's farm, containing one hundred and seventy-five acres, or thereabouts, lying on the river of Raritan, opposite to this oyster bed, and extending, according to the words of the deed, to the bank of the river; that one Joseph Coddington, who had before owned and possessed the said farm, and under whom the plaintiff held, had, twenty years ago, and more, and while so in possession, staked off a part of the oyster bed in question, and that part of it, too, from which these oysters were taken, and had, during his time there, claimed the exclusive right of taking oysters upon the bed so staked off; but the people had always disputed that right, had entered upon it, and taken oysters from it, when they pleased, and if opposed by Coddington that the strongest usually prevailed.

And it further appeared, that the plaintiff soon after he came into the possession of the said farm, staked off the present bed,

being greater, but including Coddington's, began to plant oysters upon it, and has continued to plant more or less, at the proper seasons, every year since that time; that some of the stakes, by which it is so staked off, stand below low-water mark, but that they are so slender as to oppose no obstruction to the navigation of the river, even with the smallest craft; that this bed is about fifty yards below common low-water mark; the tide ebbs and flows over it; it is frequently bare at the full and change of the moon, and commonly, though not always, so in the fall and spring; that there have always been oysters upon it, as well as upon the other beds in these waters, and that the space between it and the shore is what they call a mud flat, commonly covered with water, but not a channel for vessels or other craft usually plying in that river.

And it further appears that the plaintiff, on the third of April, 1818, by virtue of a warrant of location from the proprietors of East Jersey, caused a survey to be made for himself there of forty-one and fifty-nine hundredths acres of land covered with water, including a certain survey of wharves formerly made to one Sonmans, and leaving for his survey, thirty-five and fifty-nine hundredths acres, including the oyster-bed in question. And although it appeared, that this survey had been made before the supposed trespass, and had been approved and recorded in due form, yet it did not appear, that such approving and recording had been before the said trespass, the time of the recording not appearing upon the record. And it further appeared in evidence, that the defendant had entered upon the said bed, so staked off, and taken oysters there, at the time in the declaration set forth. And, indeed, it was admitted by the defendant himself, that he, together with others, had so done, but merely with a view of trying the plaintiff's pretended right, and not with a view of injuring the bed, or taking the oysters further than was necessary for this purpose.

Upon this state of facts, the defendant moved for a nonsuit: 1. Because the plaintiff had shown no title arising from possession only, that is, an exclusive and adverse possession; 2. Because he had shown no title under the proprietors, it not having appeared that his survey had been approved and recorded before the supposed trespass was committed; 3. Because the proprietors themselves had no title which they could convey, even if the form of conveyance had been complete. Upon the last of these reasons the plaintiff

iff was called. But yet, still, in showing cause upon this rule, the defendant's counsel have insisted upon the first and second reasons, also against the claim of the plaintiff, which he still maintains, so that it becomes necessary to look a little into each of them in their order.

And, 1. As to the mere possession. This is no other way proved than by showing the conveyance for, and the possession of the Nevill farm upon the shore opposite to this oyster-bed, extending, to make the most of it, to the water's edge only; and by showing further, the staking off of the said bed, the planting of oysters upon it, and sometimes fishing and taking oysters there, as other people also did, the claim of exclusive right notwithstanding. Now upon this it is to be observed, that though a grant of land to a subject or citizen, bounded upon a fresh water stream or river not navigable, and where the tide neither ebbs nor flows, extends to the channel of such river, *usque ad flum aquae*, as they have it in our old books; yet that a grant of land bounded upon a river or other water which is navigable, and where the tide does ebb and flow, extends to the edge of the water only, that is to say, to high-water mark, and no further. See the case of the River Banne, Davies, 152, 155; Harg. L. T. 5; *Carter v. Murcot*, Burr. 2162. All pretense of possession, therefore, in this case, as being connected with, and appurtenant to, the adjacent land, must fail. The grant for that could extend only to high-water mark, and it could, therefore, carry with it no part of the adjacent land covered with water. And if the plaintiff would set up a possession founded upon the staking off the bed, planting oysters upon it, and sometimes fishing there, even if it were a subject-matter that could be taken possession of in that way, that possession has not been proved to be either so complete, so exclusive, or so continued, as to establish a right against those having equal claim with himself. He pretends to no prescription, none such exists in this country; he pretends to no grant, none has even been mentioned. He places himself in the situation of a fisherman, who, because he has fished for many years, would claim the exclusive possession of the waters, and the exclusive right of fishing in them. Upon the ground of possession merely, then, I think the plaintiff cannot stand. But the nonsuit cannot be maintained upon this alone, because he sets up another title.

2. As to the form of the conveyance and the operation of the survey. The proprietors of East Jersey are tenants in common

of the soil; their mode of severing this common estate is by issuing warrants, from time to time, to the several proprietors, according to their respective rights, authorizing them to survey and appropriate in severalty the quantities therein contained. Such warrant does not convey a title to the proprietor—he had that before; it only authorizes him to sever so much from the common stock, and when so severed by the proper officer, it operates as a release to him for so much. This is the case when the proprietor locates for himself. When he sells his warrant to another, that other becomes a tenant in common with all the proprietors *pro tanto*, and in the same manner he proceeds to convert his common into a several right. Regularly there is a deed of conveyance upon the transfer of this warrant for so much of the common property, and that deed of conveyance, and the survey upon the warrant is the title of the transferee. It is true that the survey must be inspected and approved by the board of proprietors, and must be carefully entered and kept in the secretary's office, or in the office of the surveyor-general of the division; but this is for the sake of security, order, and regularity only, and is, by no means, the passing of the title. It proves that the title has already passed, but it is not the means of passing it. It may be likened to the acknowledgment of a deed by a *feme covert*. Her deed cannot prevail against her, unless such acknowledgment be regularly made and recorded; yet such acknowledgment does not pass the title; the deed has already done that, and it operates from its date.

The view which has been taken of this subject, and so much insisted upon by one of the defendant's counsel, I think is quite too narrow. He has placed himself upon the third section of the act of January 5, 1787, "for the limitation of suits respecting titles to lands." That section enacts, "that a survey made, inspected, and approved by the council of proprietors, and by their order recorded in the secretary's office, or in the surveyor-general's office, shall, from and after such record is made, preclude and forever bar such proprietors from any demand thereon, any plea of deficiency of right, or otherwise, notwithstanding."

Now, this is a statute merely for the limitation of suits. It is made for the benefit of him that has the survey, if he procures it to be inspected, approved, and recorded, it is a bar against the proprietors and those holding under them; if he does not do so, it is no bar, but stands just where it did before the statute was made. The statute is not imperative upon him that

has the survey to procure it to be inspected, approved, and recorded; it does not make it void in case he does not do so, but leaves it where it was before, and he loses his bar.

Let us see, then, how those surveys were viewed before this statute. We shall be enabled, pretty satisfactorily, to do this by looking into the act of March 27, 1719. In the tenth section of that act, it is enacted, "that the surveyor-general shall hold a public office, in which shall be carefully entered and kept the surveys of all lands thereafter to be made; that such entries shall be considered as matter of record, and may be pleaded as evidence in any of the courts," etc.; but it prescribes no time within which they shall be entered, nor does it make them void if not so entered. In the eleventh section of the same act it is recited "that great inconveniences have happened by making and not recording of surveys, whereby many have not only got lands surveyed which have been formerly surveyed, not knowing of any former survey, but have settled and made great improvements on the same, and have been afterwards ousted thereof," and then it is provided, "that surveys heretofore made shall be brought in and recorded within a certain time, or forever after to be void and of no effect as against succeeding surveys of the same lands duly recorded." Now, if those prior surveys had been of no effect until they were approved and recorded, how could those who had settled and improved under posterior surveys be ousted by them? or how could the evil here complained of ever have happened at all? and if they had effect, that effect is in no way impaired by this act, unless it be against posterior surveys of the same lands, duly approved and recorded. The truth is, I believe that the survey of the proper officers, under a warrant duly issued for that purpose, has always been considered as the act of severance; the inspecting, approving, and recording, as relating back to that act; and the party surveying, as having an estate in severalty from that time. And, of course, except in the case of posterior surveys, the time of inspecting, approving, and recording has not been thought material. And as to the mode of partition, however necessary it may have been in other cases of tenancy in common, that it should be made by deed; yet in this proprietary estate, upon locations of this kind, I believe it has never been so done. As to the form of the conveyance, therefore, in this respect, the defendant's objection cannot prevail.

3. As to the right of the proprietors to convey. This is the great question in the cause, and though we have taken time

since last term to look into it, yet I must confess, for myself, that I have not done so in so full and satisfactory a manner as could have been wished, and my apology must be, that during a very great part of the vacation, I have been necessarily abroad, attending to other official duties, and during the time I had assigned to myself for this purpose, I have been so much indisposed as not to be able, very satisfactorily, to attend to business of any kind. I have nevertheless, so far looked into it as to satisfy myself of the principle that must prevail.

The grant of Charles II. to the duke of York, was not only of territory but of government also. It was made, not with a view to give that territory and that government to the duke, to be enjoyed as a private estate, but with a view to the settlement of it as a great colony, to the enlargement of the British empire, and the extension of its laws and dominions. In construing this grant, therefore, we ought always to have our eye fixed upon these great objects. If we shall find some things contained in it, which by the laws of England as well as of all other civilized countries, and even by the very law of nature itself, are declared to be the common property of all men, then, by every fair rule of construction, we are to consider these things as granted to him as the representative of the sovereign, and as a trustee to support the title for the common use, and especially so, if we shall find that the king himself had no other dominion over them.

The grant is not only of all lands, but of "all rivers, harbors, waters, fishings, etc., and of all other royalties, so far as the king had estate, right, title, or interest therein, together with full and absolute power and authority to correct, punish, pardon, govern, and rule all such, the subject of the king, his heirs and successors, as should, from time to time, adventure themselves into the said territory;" and for this purpose to make statutes, ordinances, etc., providing the same should not be contrary to the laws, statutes, and government of England, but saving to the inhabitants, nevertheless, the right of appeal, and to the crown the right of hearing and determining the same. The duke was to govern, but he was to govern, substantially, according to the principles of the British constitution. The colonists were to be governed by him, but, by the very words of the charter, they were to be British subjects, and to enjoy the protection, liberty and privileges of the British government. In order to accomplish those great objects, the king selected his royal brother, and granted to him all the rights which he himself had, or

could exercise in and over this great territory, saving to himself only, the right of hearing appeals. Those things, therefore, which were, properly speaking, the subjects of property, and which the king himself could divide and grant severally to the settlers; the duke, by virtue of this charter, could also divide and grant; but those things which were not so, and which the king could not grant, but held for the common use, the duke necessarily held for the same use, and in the same way.

Let us see, then, upon what principle the king held the subject-matter of this inquiry, what right he had in it, and how far he could dispose of it.

Everything susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become private property. Those things not divided among the individuals, still belong to the nation, and are called public property. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called "the domain of the crown, or of the republic;" others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called common property. Of this latter kind, according to the writers upon the law of nature and of motives, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts: Vattel, lib. i. 20; 2 Bl. Com. 14. But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession only can be had; and inasmuch as the title to them, and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people. This principle, with respect to rivers and arms of the sea, is clearly maintained in the case of the royal fishery upon the Banne, in Ireland, in Sir John Davies' report of that case, 56, 57, and in Hale's treatise *de jure maris et brachiorum ejusdem*. Bracton, too, quoting from Justinian, says: "*Publica sunt omnia flumina et portus ideoque jus piscandi omnibus commune est in*

*portu fluminibusque, et riparum etiam usus est publicus jure gentium, sicut et ipsius fluminis*": Bracton, lib. i. chap. 12.

In *Lord Filzwaller's case*, 1 Mod. 105, it is said that in an action of trespass for fishing in river where the tide flows and re-flows, it is a good justification to say, that the *locus in quo est brachiam maris in qua unusquisque subjectus domini regis habet et habere debet liberam piscariam*, for that *prima facie*, the fishing is common to all. In *Warren v. Matthews*, 6 Mod. 73, we are told every subject of common right may fish with lawful nets in a navigable river, as well as in the sea, and the king's grant cannot bar him thereof. *Same case*, Salk. 357; *Carter v. Murcot*, Burr. 2162, in navigable rivers the fishing is common; it is *prima facie* in the king, but is public, and for the common use.

Nothing can be more clear, therefore, than that part of the property of a nation which has not been divided among the individuals, and which Vattel calls public property, is divided into two kinds, one destined for the use of the nation in its aggregate national capacity, being a source of the public revenue, to defray the public expense, called the domain of the crown; and the other destined for the common use and immediate enjoyment of every individual citizen, according to his necessity, being the immediate gift of nature to all men, and therefore, called the common property. The title of both these, for the greater order, and, perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the king's forests and fall and carry away the trees, though it is the public property; it is placed in the hands of the king for a different purpose, it is the domain of the crown, a source of revenue; so neither can the king intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation; the enjoyment of it is a natural right, which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be.

But if this be so, it will be asked, how does it happen that in England, whose polity in this respect we are now examining, we find not only navigable rivers, but also arms of the sea, ports, harbors, and certain portions of the main sea itself upon the coast, and all the fisheries appertaining to them, in the hands of individuals. That the fact is so cannot be contro-



verted; but how it became so is not so easy, at this period of time, satisfactorily to show. So far as it depends on royal grant however, it seems pretty clear, that it has always been considered as an encroachment upon the common rights of the people.

An exclusive right of fishing in a navigable river is said to be a royal franchise, that is, a privilege or branch of the royal prerogative, granted by the king to a private person. This royal prerogative, we are told, was first claimed by the crown upon the coming in of William the Conqueror, and was considered by the people to be a usurpation of their ancient common rights. Accordingly in *magna charta*, which is said to be nothing more than a restoration of the ancient common law, we find this usurpation broken down and prohibited in future. That charter, as passed in the time of King John, enacts, "that where the banks of rivers had first been defended in his time, (that is, when they had first been fenced in, and shut against the common use, in his time), they should be from thenceforth laid open." And by the charter of Henry III., which is but an amplification and confirmation of the latter, it is enacted, "that no banks shall be defended (that is, shut against the common use) from henceforth, but such as were in defense at the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time." By this charter it has been understood, and the words fairly import, that all grants of rivers, and rights of fishery in rivers or arms of the sea, made by the kings of England before the time of Henry II. were established and confirmed, but that the right of the crown to make such royal grants, and by that means to appropriate to individuals what before was the common right of all, and the means of livelihood for all, for all future time, was wholly taken away. And whatever diversities there may be found in the books, with respect to the different kinds of fishery, it can no way effect the operation of the charter in this respect, because that forbids all manner of fencing in, or shutting fisheries against the common use. All claim, therefore, of an exclusive right of fishery in a navigable river, founded upon the king's grant, or prescription, which presupposes a grant, must reach as far back as Henry II. This we find expressly laid down by Sir William Blackstone, one of the greatest men that ever wrote upon the laws of England: 2 Bl. Com. 39. Lord Chief Justice Holt, too, lays it down as a principle, "that the king's grant cannot bar a subject from fishing in a navigable river:" 6 Mod.

73; Salk. 357, and pretty nearly to the same effect is Mod. 105. The case of *Carter v. Muroot*, seems to admit that such a right can be maintained by prescription, which runs back beyond the memory of man: Burr. 2162.

Against this doctrine has been cited, and much relied upon, Lord Hale's treatise *de jure maris brachiorumque ejusdem*, given to us by Hargrave in his law tracts, and the case of the royal fishery upon the river Banne, in Ireland, by Sir John Davies. But making a little allowance for both the judge and the reporter being disciples of Seldon, and converts to his doctrine of the *mare clausum*, every thing they have said may, in my view of it, be admitted in the fullest extent, and yet the positions here laid down be in no way shaken; nay, indeed, I have rather considered them as the great foundation upon which they are to rest.

Lord Hale says: "The sea, and the arms of the sea, and the navigable rivers in which the tide ebbs and flows, are of the dominion of the king, as of his proper inheritance, and that this dominion embraces, also, the shores, *litura*, the spaces covered with slime and mud deposited by the water between the high and the low water mark, in the ordinary flow and reflow of the tide; that this dominion consists, first, in the right of jurisdiction, which he exercises by his maritime courts, and secondly, the right of fishing in the water; but that though the king is the owner of these waters, and, as consequent of his property, hath the primary right of fishing therein, yet the common people of England have regularly a liberty of fishing in the sea and the creeks, and the arms thereof, as a public common piscary, and may not, without injury to their right, be restrained thereof." This is the general doctrine.

He then proceeds and says, that "though the king hath this right, *communi jure*, yet a subject, also, may have such right and that either by king's grant, or prescription; that the king may grant fishing within a creek of the sea, and that he may also grant a navigable river that is an arm of the sea, with the water and soil thereof."

But when he speaks of this power of granting as a common law right in the king, he must be understood as speaking of the common law before it was confined and restrained by magna charta, and as it was received and acted upon by the kings of England before that time; and accordingly, all the grants which he has been able to produce, after the most diligent search, are before the date of that charter. He has given in support of his

doctrine five grants, and five only; one by Canute the Dane; two by William the conqueror; one by Edward the confessor, and one by John himself before passing of this statute. And that the law was so understood at that time, or rather so construed by arbitrary kings; that they did so grant, and that those grants were confirmed by magna charta, and are now the foundation of most of the several rights of fishery in England, cannot be doubted. And beside this, Lord Hale, in his treatise, has nothing material on this subject that I can discover. In examining this subject, I do not speak of the *jus regium* as it is called, the right of regulation which the king has in all the navigable waters of the kingdom, that is quite another thing, and wholly foreign from the present question.

Then as to the case of the Banne water, in Ireland. It was this: the plaintiff had obtained a royal grant for the territory of Rout, adjoining the river Banne, in which grant was contained, among other things, *piscarias, piscationes aquas aquarum cursus* etc., in *territorio predicto*, reserving to the crown three parts of the said fishery. And the question was, whether this fishery passed by the grant; and it was held that it did not; not, indeed, upon the principle that the king could not grant in that case, but upon the construction of the grant.

In the discussion of the case, however, it was laid down "that every navigable river, so far as the tide ebbs and flows, is a royal river, and that the fishery of it is a royal fishery, and belongs to the king by his prerogative; and the reason is, that the river participates of the nature of the sea, and is said to be a branch of the sea, so far as it flows; and the sea is not only under the dominion of the king, but is also his proper inheritance, and, therefore, he shall have the land gained out of it, and also the grand fishes of the sea, such as whales, sturgeons, etc., which are royal fish, and no subject can have them without the king's special grant; and he shall have the wild swans, also, as royal fowls, on the sea and its branches."

Now what does this, taken in its whole extent, prove? It proves that the wisdom of the law has placed the titles of rivers, etc., in the king; that if the river shall leave its bed, or if otherwise there shall be alluvions or derelictions by the waters, the land so made shall then, and not before, belong to the king as part of his domain; and that he has an exclusive right, in these waters, to his royal fish and swans, but it proves no more. Nay, indeed it does prove more, for the very position that he has an exclusive right to the royal fish and swans, proves that

he has no such right to any others. It would be absurd to contend that he has an exclusive prerogative right to these fish and swans, if he had also the same right to all the fish in the river, and all the aquatic birds upon it.

Again, it is said in the same book, "that by the common law of England, a man may have a proper and several interest as well in a water or river as in a fishery, and that, therefore, a water may be granted." The cases produced to support the latter part of this position are grants from private individuals to private individuals, but even if they were from the king it would not alter the case, for there is no doubt that many such exist; but the question is, can such a grant be made by the king since the reign of Henry II.? It is enough to say, that no instance of it has been produced. Recent confirmations of ancient grants made before that time, which are recognized and established by the charter of Henry III. prove nothing to the purpose.

Upon the whole, therefore, I am of opinion, as I was at the trial, that by law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and re-passing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products (a few things excepted), are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him, not for his own use, but for the use of the citizen; that is, for his direct and immediate enjoyment.

I am of opinion that this great principle of the common law was, in ancient times in England, gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves these common rights; that the kings themselves, also, in some instances during the same period granted them out to their courtiers and favorites, and that these seizures and these royal favors, are the ground of all the several fisheries in England, now claimed either by prescription or

by grant; that the great charter, as it is commonly called, which was nothing but a restoration of common rights, though it did not annul, but confirmed, what had been thus tortiously done, yet restored again the principles of the common law, in this, as well as in many other respects; and since that time, no king of England has had the power of granting away these common rights, and thereby despoiling the subject of the enjoyment of them.

I am of opinion that when Charles II. took possession of this country, by his right of discovery, he took possession of it in his sovereign capacity; that he had the same right in it, and the same power over it, as he had in and over his other dominions, and no more; that his right consisted chiefly in the power of granting the soil to private citizens for the purpose of settlement and colonization, of establishing a government, of appointing a governor, of conveying to him all those things appurtenant to the sovereignty, commonly called royalties, for the benefit of colonists; but that he could not, and never did so grant what is called the common property, as to convert it into private property; that these royalties, therefore, which constitute that common property, of which the rivers, bays, ports and coasts of the sea were part, by the grant of King Charles, passed to the Duke of York, as the governor of the province, exercising the royal authority for the public benefit, and not as the proprietor of the soil, and for his own private use; and that if they passed from the Duke of York to his grantees, which is a very doubtful question, then upon the surrender of the government, as appurtenant thereto, and inseparable therefrom, they reverted to the crown of England.

I am further of opinion, that, upon the revolution, all these royal rights became vested in the people of New Jersey, as the sovereign of the country, and are now in their hands; and that they, having themselves, both the legal title and the usufruct, may make such disposition of them, and such regulation concerning them, as they may think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect ports, harbors, basins, docks, and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks, and bridges for the improvement of the navigation

and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge, and improve oyster-beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labor, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the state, is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore cannot, consistently, with the principles of the law of nature, and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

From this statement, it is seen that, in my opinion, the proprietors never had, since the surrender of the government, any such right to interest in, or power over these waters, or the land covered by them, as that they could convey the same and convert them into private property, and that therefore, the grant in question is void, and ought not to prevail for the benefit of the plaintiff, and, of course, that the rule to show cause, must be discharged.

ROSELL, J. It is a fact as singular as it was unexpected in the jurisprudence of our state, that the taking of a few bushels of oysters, alleged to be the property of the plaintiff in this suit, should involve in it questions momentous in their nature as well as in their magnitude, calling forth the talents, learning and industry of our bar, affecting the rights of all our citizens, and embracing in their investigation, the laws of nations and of England, the relative rights of sovereign and subjects, as well as the municipal regulations of our country.

The plaintiff's counsel contended, that the nonsuit granted on the trial of this cause, by the chief justice, should be set aside, on two grounds: 1. That the *locus in quo*, whereon these oysters were laid, was his own proper freehold, by virtue of a proprietary right duly laid thereon, returned and approved of by the council of proprietors of East Jersey, and recorded by their authorized officer, in consequence of which he claims a several fishery; 2. That he had purchased and planted those cysters on the spot whence they were taken by the defendant,

and as a public notice, that he, by placing them on the soil of the river Raritan, had not abandoned his property in them, he had surrounded them with small stakes. The defendant claims a right to those oysters, having taken them from a bed called an oyster bed, situate on the river Raritan, below the common low water mark, and on which it had been usual for the people of East Jersey to fish for oysters, from the first settlement of the country.

In support of the first of these positions, the counsel for the plaintiff contended, that Charles II. in the year 1664, granted unto his brother, the duke of York, the land, soil, seas, bays, rivers, with divers franchises, royalties, and government of New Jersey; that the duke of York granted the same, in like words and powers, to Lord Berkley and Sir George Carteret; that these, by grant, conveyed to the Earl of Perth, William Penn, and others, that part of New Jersey called East Jersey, and to Edward Billings that part called West Jersey, together with all the royalties, franchises, and government, as fully as they were granted by the king to the duke of York, and that the present proprietors of East Jersey, deriving their respective titles to their several shares or proportions to all the unlocated soil and waters of East Jersey, by virtue of several mesne conveyances from the original proprietors, had a legal power to dispose of rights to the plaintiff to locate them on this oyster bed, whereon the trespass is alleged to have been committed. And it is insisted that as Charles II. did grant, so he had the power to grant, not only the whole soil of a newly discovered, or conquered country, but certain parts of his royal prerogative as named in the grants or letters-patent to and from the duke of York.

In support of these positions, they cite numerous authorities: Vattel, 120-25-27, secs. 101, 210 and 266; 2 Bl. Com. 15; 1 Id. 264, 286; Davies, 152; 6 Com. Dig. Navigation D. 50, 60, title Prerogative; 4 Burr. 2163-64-65; 3 Cruise, sec. 14, title Deed, 565-68; 17 John. 209-10-13; *People v. Platt* [8 Am. Dec. 382], 3 T. R. 253; 2 Binn. 475; *Carson v. Blazer* [4 Am. Dec. 463], 4 Mass. 140; Har. & McHen. 564; Har. L. T. 5, 7, 10, 11, 14, 17, 19; 1 Rutherf. 91; 2 Id. 82; 3 Chit. Crim. Law, 359; 2 Ld. Raym. 1274; 2 Salk. 666; Smith's Hist. N. J.; Leaming & Spicer, Grants and Concessions.

From these authorities it abundantly appears that by the law of nations and of England, a conqueror has a right to impose such laws on the conquered as he may think proper; that in

England, all property, real and personal, capable of ownership, vests in some one or more individuals or bodies corporate; that the titles to lands in England are said to be held, in general, mediately from the king; that certain rights and powers are vested in him, as the head of the government, under the name or title of prerogative, amongst which may be numbered, on the present occasion, the sovereignty of the sea to a certain extent, and of all public rivers, royal fish, as whales and sturgeon, wrecks, treasure-trove, etc.; that the kings of England have, from time to time, frequently alienated part of the domains belonging to the crown, and bestowed many franchises on their favorites, and rewarded individuals for their faithful services, with parts of their lands, or granted them many exclusive privileges, as a right to fish in the arms of the sea, or public rivers wherein the sea ebbs and flows; and lastly, that king Charles II. did, in the year 1664, grant to the duke of York, all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings, fowlings, and all other royalties belonging, or appertaining to the state of New Jersey, as well as the government of the same (saving and reserving to the crown, the receiving, hearing, and determining appeals in and touching any judgment or sentence to be there made or given); to appoint governors, and to make all necessary laws, etc., so always that they be not contrary to the laws and statutes of England, but as near as may be agreeable thereto.

After a careful examination of the authorities cited to establish the plaintiff's claim to these oysters, and his right to a several fishery on the bed whereon they were laid, I shall proceed to examine the correctness of the inferences and conclusions his counsel have drawn from those authorities. And it may not be amiss to take a very brief view here of the manner in which this country was first settled by English subjects.

In the preface of *Grants and Concessions*, by Leaming & Spicer, they say: "The great success of the house of Austria, on this side of the Atlantic, and the prodigious wealth they had drawn from their colonies, could not fail pointing out to so enterprising a people as the Britons, this as a seat of future wealth and grandeur. But the authority of a limited government, aided by the example of a few individuals, would have scarcely been sufficient to prevail on the common people to shake off that attachment inherent in all to their native soil, and dare an untrod ocean in search of a country they had only



heard of. It was, therefore, necessary to cultivate such a spirit as should ripen them for the undertaking; in order to which king Charles II., in 1668, granted to the duke of York the soil and government of New Jersey, who afterward transferred the same to other proprietors, who wisely secured to the adventurers their religion, liberties and property, by which New Jersey was, with great rapidity, transformed from a savage wilderness to a christian and civilized country."

These Grants and Concessions, as well as Smith's Hist. of New Jersey, contain many provisions, agreements, and descriptions of the country, and invitations to settlers from England. In the seventh section of what is called their great charter (Leaming & Spicer, 395), they, the proprietors, declare that none shall be deprived or condemned of life, liberty, or estate, or any way hurt in his or their privileges, freedoms, or franchises, without a trial by jury. So, in page 12, they secure to the settlers all such freedoms and privileges within the said province, as to his majesty's subjects do of right belong. In page 28, the proprietors instruct their governor to especially provide for the interest, liberty, and defense of all who shall plant or inhabit the said province. In page 54, the proprietors set forth their claim to all strays of beasts at land, and all wrecks at sea. In page 41, in the year 1682, the duke of York confirms to the twenty-four proprietors, their heirs, and assigns, as well for the planting, peopling, and improving the lands, territories, etc., all islands, bays, rivers, etc., repeating all things named in the original grant, with all his interest, claim, and demand in law or equity; and then goes on to say (page 148), as also the free use of all bays, rivers, and waters, leading into, or lying between the said premises (of East Jersey), for navigation, free trade, fishing, or other ways.

This confirmation became necessary to establish the rights of the proprietors, for two reasons: 1. The Dutch had claimed a right to this country, and had, for a number of years, possession of New York, and parts adjacent in this state, and also had made settlements on both sides of the Delaware. They were dispossessed thereof in 1668, by the English, under Colonel Nichols. At the expiration of the war that followed soon after between England and the states of Holland, they were silent as to their pretensions to this country; 2. Although it might be true, that Charles II., might delegate the powers of government to an individual, and endow him with many royal franchises, it was strongly contended, that the duke of York,

had no such power; and more especially it could not pass from proprietor to proprietor, in the manner this state has been conveyed. These objections were laid before the king; the proprietors were made acquainted with those difficulties, which occasioned them to say (Leaming & Spicer, sec. 613): "Her majesty hath been advised that we have no right, nor can legally execute any of the said powers, but that it belongs to her majesty, in right of her crown, to constitute governors, etc.; and, being desirous to submit ourselves to our majesty, are willing to surrender all our pretenses," etc.

For a more full description of the powers of a conqueror over the conquered, Vattel, Dyer and Vaughan, may be consulted. In Dyer, 166, 224, and in Vaughan, 281, it is laid down: "If a king of England makes a new conquest of any country, the persons there born are his subjects, for by saving the lives of the people he gains a property in them, and may impose on them what laws he pleases. But, until such laws are given, the laws and customs of the conquered country shall hold place, unless contrary to our religion, or *malum in se*, or are silent. In all such cases, the law of the conquering country shall prevail." In 2 Salk. 412, where the laws of the conquered are rejected or silent, they shall be governed according to the rules of natural justice. In *Id.* 166, 411-12, and in 2 Willes, 7, if there be an uninhabited country found out by British subjects, as the law is their birthright wherever they go, they carry their laws with them, they are, therefore, governed by the laws of England.

It is true that in 1 Bl. Com. 108, it is laid down "that the common law of England, as such, does not extend to the American plantations." In this he is contradicted by the authorities above stated, and a number of others of great celebrity; by the universal understanding of all the English emigrating to this country; by the legislature of our own and several of the neighboring states; and indeed it appears directly opposed to his declarations in another part of the same page, where he says: "If an uninhabited country is planted by British subjects, all the English laws applicable to their situation are immediately there in force." What reason can be given why a people, with the approbation of their king, sent to colonize a ceded or conquered country, for the benefit and aggrandizement of the mother country, should be deprived of their birthright? Why more than if they went without the king's consent to colonize an uninhabited country, from discontent at home, from whim,

caprice, or the advancement of their individual interest? In conquered or ceded countries, which our American plantations principally are, "that have laws of their own, the king may, indeed, alter or change those laws, until which the ancient laws of the country prevail, unless such as are against the law of God, as in an infidel country. They, the American plantations, were obtained either by conquest, as driving out the natives, or by treaties:" 1 Bl. Com. 108.

This will not apply to New Jersey; it was never ceded, by name or description, to England, nor did we drive out the natives, but by a peaceable purchase became possessed of their rights of the soil, etc.; and that the proprietors, governors and settlers were all united in the opinion that the common law and the laws of England were their birthright, is manifest from what has been before stated, as well as from other parts of Leaming & Spicer, Smith's Hist. N. J., our own constitution, and decisions of our highest court of judicature. In the year 1680, the proprietors, protesting against a duty exacted of them by the duke of York, say (Smith's Hist. N. J. 118): "If we would not assure people of an easy, free and safe government, an uninterrupted liberty of conscience, and an inviolable possession of their civil rights and freedoms, a mere wilderness would be no encouragement:" Id. 118. "To say that this is a conquered country, and the king as conquerer, has the power to make laws, raise money, etc. But suppose the king were an absolute conquerer, doth his power extend over his own English people as over the conquered? are not they some of the letters that make up the word conquerer? did Alexander conquer alone, or Cæsar beat by himself? shall their armies of countrymen and natives lie at the same mercy as the vanquished? The Norman duke used not the companions of his victory so ill; natural right and human prudence oppose such doctrine all the world over:" Id. 120. Our case is better yet, for the king's grant to the duke is plainly restrictive to the laws and government of England.

There are home-born rights declared to be law by statutes, as in the great charter, 29 and 34, Edward III. chapter 2. We humbly say we have not lost "any part of our liberty by leaving our country, for we leave not our king or government by quitting our soil. Under favor, we buy nothing of the duke, if not the right of free colonization as Englishmen, with no diminution, but expectation of some increase of those freedoms and privileges enjoyed in our country. The soil is none of his;

it is the natives' by the *jus gentium* of the law of nations. It would be an ill argument to convert to christianity, to expel instead of purchasing them out of those countries." Id. 190, Governor Coxe, the greatest proprietor of West Jersey, appointed in 1687, writes thus: "I do, in my heart, highly approve of the ratified fundamentals, etc., that no person shall be deprived of life, limb, estate, privilege, freedom, franchises, without a due trial, etc., as well as all other parts of the fundamentals, if it appears there is nothing in them contrary to the laws of England, which extend to our colony, by the breach whereof we inevitably expose ourselves to the forfeiture of our charter." In 1702, Lord Cornbury was appointed governor by Queen Anne. In his address that year to the council and assembly, he says: "Her majesty has commanded me to assure you of her protection upon all occasions. Under her auspicious reign, you will enjoy all the liberty and happiness that good subjects can wish for under the best laws in the universe; I mean the laws of England." The legislature, in answer, say, "they are satisfied that the queen will protect them in the full enjoyment of their rights, liberties and properties, and they are happy under the government of the greatest queen, and the best of laws," etc. Id. 414: In 1720, Governor Burnet was appointed, and addressed the legislature; he congratulates them on the accession of George I., "to which," he adds, "you owe the preservation of your laws and liberties."

Id. 560: In 1699, the proprietors of East Jersey, in a memorial to the lords-commissioners of trade and plantations, offer to surrender the government thereof to the king, towards which, they say, they enumerate the following particulars: "First, that his majesty would confirm to them the soil and lands." And in the thirteenth article, "all lands, goods and chattels of felons, etc., treasure-trove, mines and minerals, royal mines, wrecks, royal fish, that shall be forfeited, found, or taken within East Jersey, or within the seas adjacent, to remain to the proprietors," etc.

Id. 572: This not succeeding, in 1701 the proprietors of East and West Jersey presented another memorial, section fourteen of which says: "That all such further privileges, franchises and liberties, as upon consideration shall be found necessary for the good government and prosperity of the said province, and increasing the trade, may be granted to the proprietors:" Leam. & Spi. 681. In 1680, "As we are the representatives of the freeholders of this province, we dare not grant his majesty

patent, though under the great seal of England, to be our rule; for the great charter of England *alias magna charta*, are the only rules of privilege and safety of every free-born Englishman."

Thus, our forefathers, bringing with them so much of the common law of Great Britain as was applicable to their change of situation, settled New Jersey, claiming, as their birthright, all the liberties enjoyed in their native land, with the addition of a number of privileges granted them by the proprietors, as an encouragement to them, and as a benefit to both.

As to the right of Charles II. to grant the seas, bays, rivers, fisheries, and other royal franchises in such manner as to now vest, by a string of conveyances from subject to subject, a several fishery in the plaintiff, as contended for by his counsel: Dav. 150, 152; Burr. 2164; 3 Cruise, 170; Franchise, sec. 68; Salk. 637; and Esp. Dig., pt. i, 270, are relied on as supporting that position. In the case of the royal fishery of the river Banne, in Ireland, it was resolved by the court then: "1. That a man may have a proprietorship, and as well in a water or river as in a fishery, and therefore a water may be granted; 2. There are two kinds of rivers, navigable and not navigable. Every navigable river, so far as the sea ebbs and flows, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative. But in every other river not navigable, and in the fishery of such rivers, the tenants on each side have an interest of common right. The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is because such river participates in the nature of the sea, and is said to be a branch of the sea. The sea is not only under the dominion of the king, but is his proper inheritance; and, therefore, the king shall have the land which is gained of the sea; also the grand fishes of the sea, as whales and sturgeons, which are royal fishes, and no subject can have them without the king's special grant, for the king ought of right to save and defend his realm as well against the sea as against his enemies.

"The commission of sewers was awarded by the king, by virtue of his prerogative, and extends to not only walls and banks of the sea, but also to navigable rivers and fresh waters. In statute 25 Henry VIII., the king, by reason of his prerogative, ought to provide that navigable streams be made passable. The city of London, by charter from the king, had the river Thames granted to them. But because it was conceived

that the soil and the ground of the river did not pass by the grant, they purchased another charter, by which the king granted them *solum et fundum* of the said river, by force of which the city receives rents of those who fix posts or wharves on the soil of said river; and although the king permits people to have passage over such rivers, he hath the sole interest in the soil and also in the fishery, although the profit of it is not commonly taken by him if it is not of extraordinary and certain value, as the fishery of the Banne hath at all times been. Wherefore, it was resolved that the river Banne, so far as the sea flows and ebbs in it, is a royal river, and the fishery of salmon there is a royal fishery, which belongs to the king as a several fishery, and not to those who have the soil on each side the water. On the other hand, it was agreed that every inland river not navigable appertains to the owners of the soil where it has its course."

3. That no part of this royal fishery of the Banne could pass by the grant of lands adjoining by the general grant of all fisheries. This is a fishery in gross, and a parcel of the inheritance of the crown by itself. The case itself, also, states that in this river Banne there was a rich fishery of salmon, which was parcel of the ancient inheritance of the crown, as appears by the pipe-rolls and surveys, where it was found in charge of the officers of the pipe office as a several fishery, and was granted to the city of London in fee-farm. This was intruded on and shared amongst the Irish lords, who took possession by strong hand, and held it a long time. The king granted by letters patent to Sir Randal McDonald, a parcel of the county of Antrim adjoining the river Banne, where the fishery is, together with all waters, fish and fisheries within the said territory. . And the question before the court was, whether the grant included any part of this fishery? Which was determined in the negative, on the ground, that it was a several fishery belonging to the crown, as a parcel of its ancient inheritance, which was proved by several pipe-rolls and surveys, and was in charge of the officers of the pipe office. It was also let in fee-farm, the mode by which the lands attached to the crown were generally held by the tenants of the crown. Nor do I see how else it could be called a royal fishery, and salmon royal fish, which is in the same book, as well as in many others, confined to whales and sturgeons. The same book, 111-12, in another case of tanistry, says, "The king as conqueror of Ireland, has possession of all lands which he willeth to seize and retain in his own

hands for his profit or pleasure. And where the natives of a conquered country are received under the protection of the conqueror, and are permitted to retain their possession, their heirs shall be adjudged in a good title, without grant or confirmation, according to the rules of law there established." Salkeld, Espinasse, and other authorities, cite the case from Davies of the river Banne, as supporting the doctrine they hold.

2 Cruise, 278: "A franchise is a branch of the royal prerogative, subsisting in the hands of a subject by grant from the king, annexed to manors, and the right to hold courts leet, to have waifs, wrecks, royal fish, which consist of whales and sturgeons." So in Id. 297: "A free fishery, or exclusive right of fishing in a public river, is a royal franchise, which is now frequently vested in private persons, either by grant from the crown or by prescription." But he adds: "This right was probably first claimed by the crown upon the establishment of the Normans, and was deemed by the people a usurpation."

In 4 Burr. 2162, it was declared as the opinions of the whole court, that one might prescribe for a several fishery, parcel of a manor, where the sea flows and reflows, but he must prove a right by prescription, the presumption is against him. In navigable rivers, where the sea flows and reflows, the right of fishing is common. And Lord Mansfield adds: "The rule of law is uniform, in rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; but in navigable rivers they have it not, the fishery is common."

In 1 and 2 Modern, Lord Hale says: "In case of private rivers, the lords having the soil is good evidence to prove he hath the right of fishing, and it puts the proof on them who claim *liberam piscariam*. But in case of a river that flows and reflows *prima facie* it is common to all. If any claim it to himself, the proof lieth on his side; and it is a good justification to say, the *locus in quo* is a branch of the sea, and that the subjects of the king are entitled to a free fishery. The soil of the Severn, with particular restraints, as *gurgiles*, is in the lords, and a special kind of fishing, but the common kind of fishing is common to all. The soil of the Thames is in the king; the lord mayor is conservator of the river, and it is common to all fishermen; therefore, there is no such contradiction betwixt the soil being in one and yet the river being common to all fishers."

5 and 6 Comyns. Titles, Navigation and Prescription: These authorities, and others, relied on by the plaintiff, cite the ancient authority of Davies and the river Banne in support of the doctrine they establish.

On the part of the defendant has been cited 1 Salkeld, 357. Lord Holt says, "the subject has a right to fish in all navigable rivers as he has in the sea:" 6 Mod. 73. "Every subject of common right may fish with lawful nets in the navigable rivers, and the king's grant cannot bar them thereof. The crown only has a right to royal fish, and that only, the king may grant." In Ld. Raym. 725: "The public are, at common law, entitled to towing paths on the banks of navigable rivers." 2 Black. 39: "A free fishery, or exclusive right of fishing in a public river, is a royal franchise, and is considered as such in all countries where the feudal polity has prevailed; though the making such grant, and by that means appropriating what it seems unnatural to restrain, the use of running water was prohibited for the future by King John's great charter, so that a franchise of free fishery ought now to be, at least, as old as the reign of Henry II." In 4 Black. 423, 424: "King John, and afterwards his son, Henry III., consented to the two famous charters of English liberties, *magna charta* and *charta de foresta*, by which care was taken to protect the subject against oppression, and every individual of the nation in the free enjoyment of his life, his liberty and his property, prohibited for the future the grants of exclusive fisheries, and the erection of new bridges oppressive to the neighborhood." The same doctrine is recognized in *Espinasse*, in Jacob's L. D., and other writers on this subject.

5 Bac. Abr. 494, title Prerogative: "The king's prerogative is part of the law of England, and is a word of large extent, including all the rights and privileges which by law the king hath as head of the commonwealth, entrusted with the execution of the laws; for as they maintain his safety, power and dignity, so they likewise declare the rights and liberties of the subject. Hence it is an established rule, that all prerogatives must be for the advancement and good of the people, otherwise they should not be allowed by law. The sovereignty is in the parliament, of which the king is only a part; but as executive magistrate, he is clothed with great powers, all intended for the good of the people, none to their detriment, nor can any prerogative be legally so employed. And it is to answer the ends of government, and for the good of the people, by a fiction of law he is considered the universal occupant of all lands; not that the people held their lands by any actual royal grant." Id. 156-7: "So the king has sovereign dominion in all seas and great rivers, and a right to the fisheries and to the soil, so that if a river, as far as there is a flux of the sea, leaves its channel, it belongs



to the king, who protects his subjects from pirates, and provides for the security of trade and navigation. But notwithstanding the king's prerogative in seas and navigable rivers, yet it hath been always held that a subject may fish in the sea, which being a matter of common right, and the means of livelihood, and for the good of the commonwealth, cannot be restrained by grant or prescription. Also, of common right, with lawful nets in navigable rivers, as well as in the sea, and the king's grant cannot bar them thereof, except royal whales and sturgeons, in which he has a right, as a perpetual sign of his dominion, and which only he may grant."

Id. 205: "It seems clearly agreed, that the king may alien, grant, or charge any branch of his revenue, in which he has an estate of inheritance, as also his lands in fee-simple, though seised of them as *jure coronæ*. This power is founded on reasons of state, as he cannot raise money on the subject without an act of parliament. If he had not the power of aliening his lands, the kingdom might suffer from sudden invasion," etc.

4 Comyns, Grant, E.: "By grant of a piscary, the soil or water does not pass. By a grant of water, the soil does not pass. The king, by his grant, cannot alter the law in any respect, nor dispense with things in which the subject hath an interest, or change the common law by charter of magna charta, which is incorporated into the common law." 6 Comyns, title Prerogative, D. 7; Id. D. 49: "Every navigable river, as high as the sea flows, belongs to the king; but every one may fish in the sea of common right."

On comparing all the above authorities, and the reasons on which they are founded, we are compelled to acknowledge that although the kings of England formerly may have lavished on favorites, or rewarded the service of individuals with many franchises entrusted to them for the public benefit, yet the people ever considered it as a violation of good faith, an unlawful infringement of their common rights, and as destructive alike to their liberties and their interests, until the evil, increasing beyond endurance, they, sword in hand, forced from their kings the most solemn and public declaration of their rights in magna charta.

1 Bl. Com. 128: "The absolute rights of every Englishman, as they are founded on nature and reason, so they are coeval with our form of government. At some times we have seen them oppressed by overbearing and tyrannical princes; at others, so luxuriant as even to tend to anarchy. But the vigor

of our free constitution has always delivered the nation, and the balance of our rights and liberties has settled to its proper level, and their fundamental articles asserted in parliament, first, by the great charter of our liberties obtained from King John; afterwards, its confirmation," etc.

If we add to all these the conduct pursued by the proprietors themselves, in the first settlement of New Jersey, by favorable and public descriptions of the country, and by letters to individuals to induce their fellow-subjects to settle here, we shall be more and more convinced that the claim of the plaintiff to the exclusive right of this fishery is without legal foundation. In Smith's Hist. N. J., we find the proprietors, in 1683, sent over Thomas Rudyard as their deputy-governor of East Jersey. In May, the same year, he writes from thence, page 168: "We have one thing more particular, which is vast oyster-banks, which is constant fresh victual during the winter to English as well as Indians; of these there are many all along our coasts, from the sea as high as against New York, where they come and fetch them." Id. 170: "Upon our view and survey of Amboy point, we find it extraordinary well-situate for a great town. At low-water mark, round about the point, are oysters of two kinds, some as small as English, and others two or three mouthfuls, exceeding good. We have store of clams, esteemed much better than oysters; and fish, we have a very great store. Seannets are good merchandise here." S. Groom, another proprietor, and surveyor-general, writes from Amboy, 1781, page 174: "The Indians come thither to get fish, fowl, oysters, clams, etc., as people go to market."

Gowen Lawrie, a deputy governor for East Jersey, writes from Elizabethtown, and, in page 177, says: "Pork and beef at twopence per pound; fish and fowl plenty. Oysters, I think, would serve all England." Again, in page 180: "There is a great plenty of oysters, fish, and fowl."

In page 187, three of the proprietors give a particular description of East Jersey, and say: "There are no fishermen that follow only that trade, save some that go a whaling upon the coast; and for other fish, there is abundance to be had every where through the country, in all the rivers; and the people, with seives, catch one or two barrels a day, for their own use, and to sell to others."

In page 541, the proprietors describe the country, and invite settlers thus: "It is likewise proper for such as are inclined to fishing, the whole coast and every harbor's mouth being fit for

it, which has been no small rise to the New England people, and may be carried on with great advantage. The Indians catch fish, and sell at a less price than the value of time an Englishman must spend in taking them."

As early as 1718, Nevill's Laws, 86, is found: "An act for the preservation of oysters. Section 1. Whereas, it is found that the oyster beds within this province are wasted and destroyed, the preservation of which will tend to the benefit of the poor people and others inhabiting this province, all persons are prohibited from raking or gathering oysters from off any beds in this province from the tenth of May to the tenth of September; and that no persons, at any time, should carry them away in any boat or vessel not wholly owned by a person living within the province."

And in this way others wrote to their friends; and in no part of the many public or private communications of the proprietors, or inhabitants, do we see even a hint that the navigable rivers of New Jersey were considered in any other point of view than to use their own words, "inlets which God and nature formed" as the highways to the country, or the fisheries as anything more than as the rich provision of the same bountiful Creator for the common use and benefit of the settlers. The proprietors were men who understood their rights, and were fearless in the defense of them. If those who twice purchased New Jersey; who braved the dangers of an immense ocean; shared in the toils, sufferings, and privations of the first settlers; who claimed all strays by land and wrecks by sea, in virtue of their grants, and never for a moment conceived that these grants swallowed up what, by the law of the land they had left, had ever been considered the common rights of Englishmen; shall we, after the lapse of almost three centuries, insult the memory of men who were an ornament to the human race, whose virtues have highly exalted their names, and whose labors have been a blessing to the world, by saying they knew nothing of their privileges, and that their birthrights were lost forever in the forests of New Jersey; that their boasted magna charta was a farce from which they could derive no benefit; and that liberty, which they so highly valued, was confined to the grants and concessions, or that our legislatures, from time to time taking upon them to regulate fisheries of oysters, as well as floating fish, for the public benefit, were totally ignorant of their powers, overstepped the bounds prescribed by the constitution, to the destruction of the rights of individuals? I

think not. The foregoing facts speak strong language, and impress the mind more forcibly than volumes of obstruse and theoretical reasoning; and on a careful examination of the whole subject, I am of opinion that the plaintiff had no such property in the oyster-bed in question by laying a proprietary thereon, as to give him an exclusive right to the oyster fishery there.

On the second point, I think that question has been decided by this court in the case of *Shepard v. Leverson*, 1 Pen. 391, and and although I differed from my brethren their view and determination of that case, respect for their opinions prevents a wish, on my part, to shake that determination. The chief justice there says: "That in a common fishery, no man can appropriate to himself any particular shoal, bed, or spot, to the exclusion of others. That the planting these oysters was returning them to their proper element to mix with their kind, and was, in contemplation of law a complete abandonment."

Justice Pennington says: "It is admitted that the plaintiff planted a quantity of oysters in a public navigable river or highway, where the tide ebbed and flowed, and in which fish and oysters were taken, as of right; that there were no oysters to be found at that particular spot at the time of planting. Now, although there may not have been any oysters on the particular spot where the oysters were put down at the time of doing it, yet there may have grown oysters there since, in which case he would not be entitled to all the oysters found in the same bed. This case would resemble the case of a stranger voluntarily throwing his grain or money into my heap, when, from the difficulty of separation, caused by his own folly, I would be entitled to the whole."

But the present case does not present as fair a claim to the verdict of a jury or the judgment of a court as the one from Monmouth. There it was admitted that the oysters were placed on a part of the bed of the river where no oysters grew. Here they were confessedly placed on an old and frequented oyster-bed. If returning oysters into their natural element, the river, even if no oysters grew in that particular spot, and the mere possibility of a future increase was such an abandonment of the right of ownership as to justify the taking them, in the opinion of the court, surely there can be no pretense for saying that placing them in that element where oysters had grown for ages, was not, in contemplation of law, a complete abandonment of the plaintiff's right. On much consideration of this case, I am

of the opinion that the plaintiff should take nothing by his motion.

Therefore, let the rule to show cause be discharged.

FORD, J., concurred with his brethren, but did not deliver his opinion at large.

The construction here given to the grant to the Duke of York was fully approved by the majority of the supreme court of the United States in *Martin v. Waddell*, 16 Pet. 369, where it was held that the soil of Raritan Bay and the fisheries therein belong to the state in trust for the common benefit of all the people. A similar doctrine was applied to Chesapeake Bay in *Smith v. Maryland*, 18 How. 75, where the principal case is cited as an authority on this point.

NAVIGABLE RIVER AS BOUNDARY.—There has been much controversy in the United States over the question as to whether our large fresh water rivers are to be regarded as belonging to the same class as those in which the tide ebbs and flows, so that grants bounded upon them stop at the margin of the stream, or whether the strict common law doctrine is to be applied to them and grantees of lands bordering on them are to be held to take *ad flum aqua*. The courts of some of the states have discarded the common law rule upon this subject and have held that if a river is in fact navigable, whether the tide ebbs and flows in it or not, a tract of land bounded upon it runs only to the margin. The cases which so hold proceed upon the theory that the fact of the ebbing and flowing of the tide, which was looked upon at common law as such a controlling circumstance in determining whether a river was *flumen regale*, whose bed belonged to the king, was merely fixed upon as a common incident and evidence of navigability, and that it was this latter fact which really decided the character of the river. In other words, it is assumed that the ground for holding any river to be a "royal river" was that it was navigable, and that for convenience, the circumstance of the ebb and flow of the tide, was simply adopted as decisive evidence of navigability. It is therefore claimed, with much show of reason, that while this is a perfectly fair and proper test of the navigable character of a river in a small insular country like that in which the common law had its birth, and in which every principal river is in fact subject to the fluctuations of the tide for the greater part of its distance, it is simply absurd to apply the same rule to a river like the Mississippi, rising far inland, hundreds of miles beyond the head of tide-water, and yet bearing upon its current the commerce of half a continent. Among the cases which have taken this view of the subject are *Bowman v. Walton*, 2 McLean, 376; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. City of Keokuk*, 4 Id. 199, 212; *Tomlen v. Dubuque etc. R. R. Co.*, 22 Id. 106; *Musser v. Hershey*, 42 Id. 356; *Carson v. Blazer*, 4 Am. Dec. 463; S. C., 2 Rinn. 475; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. and R. 78; *Bird v. Smith*, 8 Watta, 439; *Union Canal v. Landis*, 9 Id. 228; *Wilson v. Forbes*, 2 Dev. N. C., 30; *Ingram v. Threadgill*, 3 Id. 59; *Collins v. Benbury*, 3 Ired. 27; S. C., 5 Id. 118; *Fagan v. Armistead*, 11 Id. 433; *Cates v. Wadlington*, 1 McCord, 580 (*sed contra*, *McCullough v. Wall*, 4 Rich. S. C., 68); *Bullock v. Wilson*, 2 Porter, 447.

There is a strong array of authority, however, in favor of the strict application of the common law rule that only those rivers in which the tide ebbs and flows are to be regarded as limiting adjoining grants to high-water mark, and that in all other streams, whether large or small, the *flum aqua* is the

boundary of lands on either side, and that even the Mississippi is a stream of the second class, so that riparian owners on its banks above tide-water take to the center of the river. The principal case is cited as a leading decision in favor of this view, and has been fully affirmed on this point in New Jersey: *Gough v. Bell*, 1 Zab. 160; S. C., 2 Id. 455; *Bell v. Gough*, 3 Id. 656; *Townsend v. Brown*, 4 Id. 87; *Cobb v. Davenport*, 3 Vroom, 369; *Stevens v. Paterson etc. R. R. Co.*, 5 Id. 537. The following decisions also support the common law rule: *O'Fallon v. Daggett*, 4 Mo. 343; *Morgan v. Redding*, 3 Sm. & M. 366; *Magnolia v. Marshall*, 39 Miss. 109; *Jones v. Pettibone*, 2 Wis. 306; *Walker v. Shepardson*, 4 Id. 486; *Mariner v. Schulte*, 13 Id. 692; *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddeman*, 10 Id. 126; *Ryan v. Brown*, 18 Id. 196; *Brown v. Kennedy*, 9 Am. Dec. 503; S. C., 5 Har. & J. 195; *Gavitt v. Chambers*, 3 Ohio, 496; *Benner v. Platter*, 6 Id. 505; *Blanchard v. Porter*, 11 Id. 138; *Walker v. Board of Public Works*, 16 Id. 540; *Storer v. Freeman*, 4 Am. Dec. 155; S. C., 6 Mass. 435; *Ingraham v. Wilkinson*, 4 Pick. 268; *Young v. Harrison*, 6 Ga. 141; *Adams v. Pease*, 2 Conn. 481; *Chapman v. Kimball*, 9 Id. 38; *Middleton v. Pritchard*, 3 Scam. 510; *Board of Trustees v. Haven*, 5 Gilm. 548; *City of Chicago v. Laflin*, 49 Ill. 177; *Brason v. Bressler*, 64 Ill. 488; *Berry v. Snyder*, 3 Bush, 266; *Miller v. Hepburn*, 8 Id. 326, 331; *Granger v. Avery*, 64 Me. 292; *Jones v. Soulard*, 24 How. 41. In New York the cases on this point are not in harmony. From *Palmer v. Muligan*, 2 Am. Dec. 270; S. C., 3 Cai. 307, to *People v. Canal Appraisers*, 13 Wend. 371, the courts of that state seemed to hold generally very steadily to the common law rule. But in *People v. Canal Appraisers*, 33 N. Y. 461, all the authorities were critically reviewed in a remarkably learned opinion by Davies, J., and it was decided that the common law doctrine was not applicable to the large fresh-water rivers of this continent, but that grants bordering on them should be limited to the margin of the stream, as in the case of rivers subject to the flux and reflux of the tide.

At this distance of time, and owing to the looseness and inaccuracy of expression of many of the cases, it seems impossible to determine with certainty what was the real ground of the origin of the rule holding that the beds of navigable rivers in which the tide ebbed and flowed belonged to the king. Was it because they were navigable, and was the ebb and flow of the tide merely recognized as notorious evidence of navigability? Or was it for the reason that they were deemed to be part of the sea, of which he was the lord, because it was necessary for the defense of his kingdom, and because he only could maintain his right there? It is certain that some of the earliest authorities put the king's proprietorship of the beds of navigable tide-water streams upon the latter ground. It was not because such rivers were navigable that the king was said by these authorities to own them, but because they were merely arms of the sea. In other words, they looked upon the ebb and flow of the tide not merely as a badge, sign, or test of navigability, but as a distinguishing and essential characteristic of "royal rivers." This seems to be Sir Matthew Hale's opinion. In his famous treatise, *De Jure Maris et Brachiorum ejusdem*, Harg. Law Tracts, 10, he distinctly lays it down that rivers in which the tide ebbs and flows belong to the king, because they are looked upon as a part of the sea, and the king is said to be lord of "that great waste." So in the leading case of the *Fishery of the Banne*, Davies, 56, it is said that such rivers are the property of the king, because they are part of the sea. The reason is thus expressed in the quaint law French of the folio report: "*Il y ad 2 kinds de riviern, navigable et vint navigable. Chescun navigable river cy hault que la mer flow et reflux en ceo est flumen regale, et la piscarie de ceo est ausy piscarie royall, et appent al roy per*"

*son prerogative mes en chacun autre river nient et en la place de tel river les terriens ex austraque parte aquas ont interest de common droit. Le reason pur que le roy ad interest in tel navigable river cy hault que la mer flow et reflow en ceo, est par ceo que tel river participe del nature del mer et est dit brache del mer tant avant que el flow.*" Navigable rivers in which the tide does not ebb and flow are spoken of by Sir Matthew Hale as public rivers in which the king and his subjects have a right of passage, but he does not seem to think that they ought to belong to the king for that reason. Indeed, there appears to be no greater reason why the bed of a stream which is navigable should belong in fee to the king, or to the state, because of the public right of way over it, than that the soil of a public road should belong to the state because of a similar user.

Notwithstanding the fact that the common law doctrine upon this subject has been adopted by many of the states; the supreme court of the United States has been compelled to modify the rule in reference to our great rivers and inland seas, in the western and north-western states: *Railroad Co. v. Scharmeir*, 7 Wall. 272. The position of the court is well ascertained from *Barney v. Keokuk*, 94 U. S. 324. Mr. Justice Bradley, speaking of the right of riparian owners to accretions, says: "By the common law, as before remarked, such additions to the land on navigable waters belong to the crown, but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad difference between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether as rules of property it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

"In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Peters, 367; *Pollard's Lessee v. Hagan*, 3 How. 312, and *Goodtitle v. Kibbe*, 9 Id. 471. These cases relate to tide-water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of the *Genesee Chief*, 12 How. 443, has declared that the great lakes, and other navigable waters, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the state by their inherent sovereignty, and the United States has wisely abstained from extending, if it could extend, its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view, depended, as most cases must depend, on the local laws of the states in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of this subject.

The exhaustive examination of this question by the supreme court of Iowa in the case of *McManus v. Carmichael*, 3 Iowa, 1, really leaves nothing to be said. The precise point was directly before the court; namely, whether the title of the riparian proprietor extends below high water in the Mississippi river, and it was decided that it does not. This decision has been followed by subsequent cases, especially the case of *Haight v. Keokuk*, 4 Id. 199, and *Tomlin v. Dubuque R. R.*, 32 Id. 106." See, also, *McCready v. Virginia*, 94 U. S. 391, as to fishery rights.

In *The Montello*, 20 Wall. 430, the doctrine was applied to the Fox river, in Wisconsin, and here the court gave a test for determining "navigability;" that it depends upon the fact whether the river, in its natural state, is such that it affords a channel for useful commerce. These views of the supreme court will ultimately influence our courts; and in many recent decisions they are followed, as in *Benson v. Morrow*, 61 Mo. 345; *Wisconsin Riv. Co. v. Lyons*, 30 Wis. 61. In *Braxton v. Bressler*, 64 Ill. 488, on the other hand, the court refused to adopt the rule laid down in *Railroad Company v. Schurmeir*, holding it to be in conflict with the precedents already established in that state, and also with the case of *Jones v. Soulard*, 24 How. (U. S.) 41. The case of *Railroad Company v. Schurmeir*, 7 Wall. 272, held that in the north-west territory grants bounded upon rivers which had been declared by congress to be public highways forever, and which had been meandered and thrown out of the public surveys, should be limited to the margin of the water. The decision seems to be put upon the ground that by the acts of congress, and by the subsequent meandering of these streams, and their exclusion from the government surveys, the beds of the streams are excepted from the grants to the riparian proprietors. The logical result of this doctrine would seem to be that in such cases the beds so excepted are merely unsurveyed and ungranted public lands, and, therefore, belong to the general government, and not to the state. The late decision in *Barney v. Keokuk*, 94 U. S. 324, already referred to, indicates, however, that the supreme court will hold, when called upon, that the beds of navigable rivers, above tide water as well as below, belong to the state in which they lie.

**HIGH OR LOW WATER MARK.**—There is some confusion in the cases as to whether grantees of lands on tide water streams take to high or low water-mark. The American editors of Smith's Leading Cases, in their note to *Dovaston v. Payne*, 2 Vol. 224, say that the riparian owner takes to low water mark. There are some cases to this effect also: *O'Fallon v. Daggett*, 4 Mo. 343; *Sherlock v. Bainbridge*, 41 Ind. 35; S. C., 13 Am. Rep. 302; *Martin v. Nonce*, 3 Head. 649; *Bullock v. Wilson*, 2 Porter, 447; see also *Clement v. Burns*, 43 N. H. 609. But the common law rule certainly was that the shore between high and low water mark belonged to the king, and this is the doctrine of many of the cases: *McManus v. Carmichael*, 3 Iowa, 1; *Musser v. Hershey*, 42 Iowa, 356; *Mayor v. Eslava*, 9 Porter, 601; *Gough v. Bell*, 1 Zab. 160; *Stevens v. Paterson etc. R. R. Co.*, 5 Vroom, 537; *Stover v. Jack*, 60 Pa. St. 339; *Atty-general v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 1; *Atty-gen. v. Chambers*, 27 Eng. L. & Eq. 242; *Dutton v. Strong*, 1 Black. (U. S.); *Yates v. Mihaukie*, 10 Wall. 497; Hale's Treatise, "*De Jure Maris*," Harg. Law Tracts, 10 *et seq.* The correct doctrine seems to be accurately stated in *Stover v. Jack*, 60 Pa. St. 339, where it was held that a riparian grantee takes an absolute title to high water mark and a qualified right to low water mark. This is stated to be the law also in *Dutton v. Strong*, 1 Black, U. S. 25, where it was decided that although the riparian proprietor does not absolutely own the shore, still he has an exclusive right to build a private



or public wharf below high water mark in front of his premises. So in *Musser v. Hershey*, 42 Iowa, 356. In *Stevens v. Paterson etc. R. R. Co.*, 5 Vroom, 537, it is said that the right of the riparian proprietor to build wharves or other erections on the shore below high water mark is a mere revocable license from the state, which is the owner of the shore, and that this license does not become absolute until it has been executed. In Massachusetts the riparian owner's right extends to low water under the construction given by the courts of that state to the colonial ordinance of 1641, and under immemorial usage: *Storer v. Freeman*, 4 Am. Dec. 155; S. C., 6 Mass. 435; *Ingraham v. Wilkinson*, 4 Pick. 268. By immemorial custom also riparian grants in Connecticut extend to low water mark: *East Haven v. Hemmingway*, 7 Conn. 186. But where the question is one of jurisdiction between two states, having a river as a common boundary, the rule seems to be that if the river originally belonged to one of them, and there is no special convention to the contrary, the jurisdiction of the other will extend to low water mark on its own side. Hence as between Virginia and the states formed out of the north-west territory, low water mark on the Ohio side of the Ohio river is the boundary: *Handley v. Anthony*, 5 Wheat. 374; *Garner's Case*, 3 Gratt. 655; *Booth v. Hubbard*, 8 Ohio St. 243.

**ALIENATION OF BED OF RIVER.**—The opinion which seems to have been entertained in the principal case by Kirkpatrick, C. J., that the property of the king in the beds of ports, bays, arms of the sea, and rivers in which the tide ebbs and flows, is of such a nature that it cannot be alienated, and that it is equally inalienable in the hands of the state, as the successor of the king, is declared unsound in *Gough v. Bell*, 1 Zab. 160; S. C., 2 Id. 455; *Townsend v. Brown*, 4 Id. 87, where it is decided that such property, as well as the exclusive right of fishing in such waters, may be granted by the legislature, however the common law rule may have been as to alienation by the king. And in *Gough v. Bell*, 2 Zab. 455, it was said that even at common law, property and rights of this kind could be granted by parliament.

**PROPERTY IN OYSTER-BED.**—In *Fleet v. Hegeman*, 14 Wend. 42, it was decided that oysters are subject to similar rules to those applied to animals/fera nature, and, therefore, that one who plants oysters in a common fishery, and stakes them off, will be held to have reclaimed them, and to have acquired an exclusive property in them, so that he may maintain trespass against one who removes them. But in *Brinkerhoff v. Starkins*, 11 Barb. 249, it was decided upon the authority of the principal case, that one who plants oysters opposite the land of another, acquires no property in them. In *McCready v. Virginia*, 94 U. S. 391, the right to oyster beds in navigable waters was considered. Here it is held that paramount to the right of navigation each state owns the beds of all tide waters within its jurisdiction, and may appropriate them to be used by its citizens as a common for taking and cultivating fish, if navigation be not thereby obstructed. The right which the citizens of the state thus acquire is a property right, and not a mere privilege or immunity of citizenship.

**PROPERTY IN WATER-COURSE.**—This subject is examined at length in the note to *Gardner v. Newburgh*, 7 Am. Dec. 528.

See *Cates v. Wadlington*, *post*.

## ROOME v. COUNTER.

[1 HALSTED, 111.]

**TAKING PER STIRPES UNDER WILL.**—Where a testator, after making certain specific bequests and devises to his children and grandchildren, directed the remainder of his movable estate to be divided equally among his surviving children and “the heirs” of a deceased son, it was held that the children of the deceased took *per stirpes*, and not *per capita*.

**ERROR** to the common pleas, to reverse a judgment obtained by Isaac Counter, the plaintiff below, in an action brought against the defendants, as executors of the will of Harmanus Counter, deceased, to recover his share of a residuary bequest made by the will of the testator. The said Isaac Counter claimed as one of the children of Peter Counter, a deceased son of the testator. The plaintiff obtained a verdict below, under the instructions of the court, for one fifteenth of the said residuary bequest, whereas the defendants insisted that he was entitled only to one sixtieth thereof.

The facts are stated in the opinion.

*Frelinghuysen*, for the plaintiffs in error.

*Ford*, for the defendants.

By the Court, KIRKPATRICK, C. J. It appears by the state of this case, and by the inspection of the will in question, that Harmanus Counter, the testator, had two sons, Henry and Peter, and five daughters, Sarah, Anna, Susannah, Elizabeth, and one who married one Mandeville, who is now deceased; that Peter, one of the sons, died before the date of this will, leaving ten children, who were then living, and were still living at the time of this trial; and after making provision for all the surviving children, and having given also the plantation on which Peter had lived in his life-time to two of his sons, the testator makes the following bequest: “Item, it is my will, that all the remainder of my movable estate shall be equally divided: that is to say Henry Counter, and the heirs of my son Peter Counter, Anna Roome, Susannah Berry, Elizabeth Dodd and Sarah Counter.” And the question is, whether the children of Peter, under this bequest, shall take *per stirpes* or *per capita*, or in other words, whether the whole ten shall take their father's share only, being the one equal sixth part, or whether each of them shall take an equal share with Henry and his sisters? In the one case, the plaintiff would be entitled to the one fifteenth part of this remainder, and in the other, to the one sixtieth

part only. And if we were not a little perplexed with the cases in the books, I think we should have no difficulty in deciding this question.

In the case of *Blackler v. Webb*, 2 P. Wms. 383, that upon which the plaintiff principally relies for a distribution *per capita*. That case, however, differs from this in its circumstances, and in the words of the bequest. There the testator bequeaths the surplus of his personal estate "equally to his son James and to his son Peter's children, to his daughter Traverse's, and to his daughter Webb's children, and his daughter Man." And the lord chancellor, after much doubt, determined that the division should be *per capita*, and that each of the children of the testator's son Peter, and of his daughter Webb, should take an equal share with his son James and his daughters, Traverse and Man. The reason given is, that the grandchildren could not take under the statute of distribution, or in allusion thereto, because the testator's daughter Webb was still living, and so her children could not represent her.

The very ground upon which this case was determined, therefore, does not exist in the one before us, for here Peter was dead before the making of the will; and, besides, the bequest is not to the children of Peter, but to his heirs, a term which always carries with it the idea of representation, which the term children does not do.

In the case of *Phillips v. Garth*, 3 Brown Ch. 64, Buller, justice, sitting for the lord chancellor, seems to recognize this case of *Blackler v. Webb* as good law, and to found his opinion principally upon it, and he decrees accordingly. But there was an appeal to the lord chancellor and finding upon the argument, that he leaned much the other way; the cause was compromised by the parties, with the advice, no doubt, of the able counsel who advocated the cause.

The truth is, that this decision in the case of *Blackler v. Webb*, though made by no less a man than Lord Chancellor King, is, in itself, a very extraordinary decision, and such a one as I think would hardly be made by any court at this day. It is somewhat shaken by the case of *Phillips v. Garth*, above cited; and, to make the most of it, it can give the rule only in cases exactly like itself; and of these, the one before us, as has been shown, is not one.

When we get ourselves completely disentangled from this case, and when we consider that the testator had, in his life-time given to each of his sons a plantation for his use and occupa-

tion; that by this will he devised to his son Henry the one which he had given to him, and to two of the sons of his son Peter, the one which he had given to him, and made other equivalent provisions for his daughters, and then directs that the remainder of his movable estate shall be equally divided between his son Henry and the heirs of his son Peter, and his surviving daughters. When we consider the plain simple meaning of the words of this bequests, in the order in which they stand, and the manifest intention of the testator, to be deduced, as well from the circumstances of the case as from the words themselves, I think we cannot hesitate to say, that the children of Peter are to take *per stirpes*, as the representatives of their father, and not *per capita*; and, of course, that this plaintiff being one of those children, is entitled to one tenth part of one sixth part of the said remainder only, and not to one fifteenth of the same.

This judgment, therefore, must be reversed.

ROSSELL, J., concurred.

FORD, J., having been the presiding judge below, gave no opinion.

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In *Smith v. Curtis*, 5 Dutch, 345, 347; *Stokes v. Tilly*, 1 Stock. 130, 135, and *Fisher v. Skillman*, 3 O. E. Green, 229, 230, the peculiar provisions of the will in this case are said to take it out of the general rule that where a gift is to the children of several persons or to a certain person and the children of a certain other person, or the brothers and sisters of a certain person, they take *per capita* and not *per stirpes*. These cases all recognize *Blackler v. Webb*, 2 P. Wms. 383, as good authority on this point, notwithstanding the doubt of its soundness expressed by Kirkpatrick, C. J., *supra*, and they distinguish *Roome v. Counter*, from that case, from the fact that in Counter's will the word "heirs" is used instead of "children," and that there are other expressions also indicating that the testator's manifest intention was that the children of his deceased son should only take their father's share. In *Stokes v. Tilly*, 1 Stock. 136, special stress is laid on the use of the word "heirs," which is held to be a word of inheritance, while "children" is a word of purchase. The rule for the construction of wills in cases of this sort, is learnedly examined in *Macknet v. Macknet*, 9 O. E. Green, 277.

## PERRINE v. PERRINE.

[1 HALSTED, 133.]

LEGACY TO WIFE ABATES WHEN.—Where a testator gave his wife a legacy in lieu of dower, having no dowable estate either then or afterwards, and there was not sufficient property to pay all the legacies, it was held that the wife's legacy must abate with the rest; and that the fact that there was no dowable estate at the making of the will, or afterwards, could be proved *dehors* the will.

ERROR to the common pleas to reverse a judgment obtained against Hannah Perrine, the plaintiff below, in an action on the case brought by her against the executors of her deceased husband, Peter Perrine, to recover a legacy left her by his will. The facts are stated in the opinion of the chief justice.

*Hamilton*, for the plaintiff in error.

*Wood*, for the defendant in error.

KIRKPATRICK, C. J. Peter Perrine, the testator, in and by his last will and testament, gives and bequeaths as follows, viz: "*Imprimis*, I give and bequeath unto my well-beloved wife, Hannah, all the articles, goods and furniture that I received with her after our marriage; likewise, the sum of three hundred dollars; the said goods and furniture to be delivered to her immediately after my decease, and the said sum of money to be paid to her within three months after my decease; all the above-mentioned property, and the said sum of money, I give and bequeath unto her, my said wife Hannah, provided she shall accept the same in lieu of her right of dower, and not otherwise."

"Item. I give and bequeath unto my son Enoch, his heirs and assigns forever, all the lands now owned by me, together with all the residue of my movable property of every description not before bequeathed, provided he shall pay the several sums of money, as is hereafter directed."

Then he gives to his seven daughters, and the children of a deceased daughter, fifty dollars each, to be paid within one year after his decease; and directs that his son Enoch shall pay all his just debts, funeral expenses, the costs of executing his will, and also all the several sums of money I have given and bequeathed unto my wife, children, grandchildren, as is above directed.

It is admitted by both parties that the testator, neither at the time of making his will, nor at any time afterwards, was seised or possessed of any estate of inheritance whereof his wife could be endowed; and that Enoch, the son, has never received for his own use any estate, either real or personal, under the said will; for that the estate which the testator had in the lands of which he was possessed when he made the will, and which it is supposed he intended to devise to his said son, was a tenancy by the courtesy only. These facts thus admitted to be made part of the case, if they might be proved by evidence *dehors* the will in a court of common law, but not otherwise. It is admit-

ted, also, that the personal estate of the testator is not sufficient to pay all the legacies bequeathed. And the question is, whether, upon this state of the facts, the legacy of three hundred dollars, bequeathed to the wife, shall abate in proportion to the other legacies? And if the court shall be of opinion that it shall abate, then, by the agreement, judgment is to be entered for the defendants, with costs; and if not, then for the plaintiff for one hundred and sixty-one dollars and ninety cents, with costs.

In the case of *Blower v. Morret*, 2 Ves. 420, Lord Chancellor Hardwicke, after taking a view of the cases upon this subject, says, in substance, that a bequest being prefaced by the word *imprimis*, or, in the first place, or the legacy being made payable immediately, or out of the first moneys received, or at a time certain and short, leaving other legacies to be paid after the year, as the law is, or at a more distant day, or such other modes of expression, does not give such legacy a preference, or exempt it from a proportionable abatement, in case of a deficiency of assets. And he says further, in the same case, that though the general principle be, that a legacy given in lieu of dower shall not abate, as was settled by Lord Chancellor Cowper, in the case of *Burridge v. Bradyl*, 1 P. Wms. 127, yet that the application of this principle may depend upon facts connected with the bequest. If the wife at the time of making the will was entitled, or had an inchoate right to any dower, or third out of the testator's estate, the legacy given in lieu thereof would have a preference, and would not abate, for that the bequest in that case was setting a price upon the dower; and, if the widow thought fit to take it, it became the purchase of a dower on her part, at a fixed price, and so was not bound to abate in proportion to other legacies, because it was a meritorious consideration given by her, and not a voluntary bounty or favor from the testator. But if she has no such title or inchoate right, as if she had a jointure in bar of dower before the making of the will, it would be otherwise. And in such cases, the legacy being expressed to be in lieu of dower, it is but a closing of everything, and the words are words of course, and amount to nothing if she was not entitled to dower.

We might trace the same doctrine down through the English reporters of a later date, but as there are no evidence of the law in this court, it would be improper to do so. This decision of Lord Hardwicke settles the law upon the case before us, in all its parts. And even if his opinion, and his settling the law

upon this basis, were of less authority than they are, the plain principles of common sense, I think, would conduct every reflecting man to the same conclusion.

And, if this be so, there certainly can be no doubt but that the fact of the widow's having no title or right inchoate, at the time of the making of the will, or afterwards, may be made out by the evidence *dehors* the will. This is a matter which cannot in the common course of things appear upon the face of the will, and, therefore, if proved at all, it must be by evidence *dehors*. And to say that the application of the testator's estate in the payment of legacies shall depend upon this fact, and yet that this fact shall not be proved, would be an absurdity, which the law never can countenance. And as to the second topic of argument, to wit, that these legacies to the children and grandchildren are charged upon the residue of the estate given to Enoch, after the legacy to the wife is paid, the fact is not so; the words of the will will not bear that construction. The legacy to the wife is as much, and as expressly charged upon this residue given to Enoch, as the legacies to the children and grandchildren. And though it be true, that if it be charged upon a residue, and it should turn out that there should be no residue, the legacy must fail; yet if several legacies be charged upon a residue, and it should be insufficient to pay them all, then they must be paid *pro rata*, as far as it will reach, and that is the case here.

I am of opinion, therefore, that the judgment of the court of common pleas must be affirmed, and that by the agreement of the parties, judgment must be entered for the defendants, with costs.

ROSELL, J. Peter Perrine, supposing himself the owner of real estate, devises it to his son Enoch. To his widow he leaves "his household furniture, to be delivered immediately;" then a legacy of "three hundred dollars, to be paid in three months," in lieu of dower. To his daughter, three hundred dollars, charged on the real estate he left Enoch. It appears he was only tenant by the courtesy of the land left to his son, and that he had no other real estate. The widow took possession of the furniture, and the remainder of the personal estate would be wholly swallowed up by the payment of the legacy left her, and the testator's children, male and female, would be left without a dollar of estate. The question is, does the legacy of three hundred dollars left the widow abate proportionably with that left the daughter; or is it of that description called a specific

legacy, which must, at all events, be first paid, if assets are found to enable the executor to pay it. It is urged that this is a specific legacy, in lieu of dower, which is always favored, as well as those in lieu of a debt; and that the testator's will is to take effect according to his understanding at the time, and cannot be affected by his mistake in the amount of his property.

Legacies are general or specific. "The former shall abate in proportion, notwithstanding a direction in the place or time of payment. But it may be otherwise on a strong intent; or if it is a purchase of dower, and the wife entitled to dower:" 1 *Bridgeman's Index*, 572; 1 P. Wms. 778. "If one grant an annuity out of the manor of Dale, to which he had no title, though it would not be a charge upon the manor, yet it would be good against the person." For the main intent of the testator was to give a legacy to J. S., the legatee shall have it, one way or the other, out of the land or the personal estate. A specific legacy, Lord Hardwicke says, 1 Atk. 417, "is a bequest of a particular chattel, distinguished from all others of the same kind, as a horse, a silver cup, money in a certain chest," etc.

The general principle then is, that legacies abate proportionably when there is not assets to satisfy the whole with the exception of specific articles, or where it is for the purchase of dower, when the widow is entitled to dower. This legacy of three hundred dollars to the wife, who was not entitled to dower, must be considered a general legacy, and she is not entitled to more than a ratable proportion with the other legatees.

FORD, J., concurred.

## DICKERSON v. ROBINSON.

[1 HALSTED, 195.]

**ACTION AGAINST ADMINISTRATORS—PLEADING.**—Since the power of administrators is strictly joint, they must be sued jointly, and plead jointly, and no several judgment can be taken against them. Hence, if such judgment be taken it is wholly void, and the non-payment of it is no breach of the administration bond.

**CREDITOR SUING ON ADMINISTRATION BOND.**—A creditor of an intestate cannot sue on an administration bond, and assign as a breach thereof, the non-payment of his debt, even though he has obtained a judgment against the administrator upon which a *devastavit* has been returned. He may, however, sue on the bond, and allege as a breach the not rendering a true and just inventory or account, or that there has not been administration according to law, but the judgment will not be for his own debt, but for the whole penalty.



The opinion of the chief justice states the case.

*Kinscy*, for the plaintiffs.

*Jeffers*, for the defendants.

KIRKPATRICK, C. J. This is a case settled by the parties, and has been twice argued. The facts stated are these, that is to say: 1. November 3, 1807, Ann Robinson and Henry Freas having been appointed administrators of Samuel Robinson, deceased, together with Robert Van Mater and Howell Powell, as their sureties, executed this bond to the ordinary in the penal sum of ten thousand dollars, conditioned for the due administration of the estate in the usual form.

2. March 11, 1807, Samuel Robinson, the intestate, and Joseph Robinson, had given their joint and several bond to Ebenezer Gaskill and John Jones, in the penalty of one thousand dollars, conditioned for the payment of five thousand dollars with interest.

3. In December term, 1819, Ann Robinson and Henry Freas made a settlement of their accounts, as administrators, in the orphans' court of the county of Salem, upon which there was found in their hands the sum of two thousand three hundred and seventy-eight dollars and fifty-nine cents.

4. In March term, 1812, Henry Freas settled his separate account of the said administration in the same court, upon which it was found that there was due to him from the said estate, the sum of four hundred and forty dollars and nineteen cents. It is supposed this is his account of the balance found in the hands of the administrators on the settlement of 1807.

5. In September term, 1815, John Jones, who had survived Ezekil Gaskill, having first demanded the payment of his bond from the said administrators, and the same having been refused, and having thereupon prosecuted his suit for the recovery thereof, obtained a judgment in the same court against the said Ann Robinson and Henry Freas, as administrators as aforesaid, for the sum of three hundred and eighty-two dollars and ninety-three cents. This judgment was obtained and entered in this wise, that is to say, the action was commenced by summons, upon which Henry Freas was returned summoned, and Ann Robinson, *non est inventus*. Henry Freas pleaded separately for himself, *plene administravit*, and by the jury it was found for him, and the sum due to the plaintiff upon his bond, was found to be three hundred and eighty-two dollars and ninety-three cents, upon which judgment was entered against him, Freas, of

goods *quando acciderint*, and against Ann Robinson, who had neither been summoned nor appeared, of the goods of the intestate, *si, et si non tunc*, etc., the costs of her own proper goods. Execution was duly issued upon this judgment against Ann Robinson and returned *nulla*, etc.

6. Then this action is brought by Jones, by the permission of the ordinary, upon the administration bond, to recover the amount of this judgment; and the only breach assigned, to which the facts admitted have any relation, is, that the said administrators have not paid the said judgment.

Upon this case, I observe, that the course of proceeding has been altogether misconceived, for, 1. In the first place, though it is well settled that co-executors are not liable for the waste of each other, and that, therefore, each may plead separately and specially to show this matter and to exonerate himself, yet it is not so with co-administrators; their power is joint only, and not joint and several, like that of co-executors; they must act jointly; they must sue and be sued jointly; they must appear and plead jointly; or if one only be summoned, and the other returned *non est inventus*, he that is summoned may, and indeed must, by statute, plead for both, but the plea must be joint, and, therefore, the judgment for, or against them, must be in their joint capacity. The waste of one is the waste of all, so far at least, as relates to creditors and next of kin; their remedies against one another is a different thing.

It has been insisted with some degree of zeal, in the argument, that though this may be the ancient principle contained in the books, yet that principle is altered by our act of March 2, 1795, entitled "an act concerning executors, and the administration and distribution of intestates' estates." In the eighth section of the act it is said, "that all administrators, of whatever kind or description they may be, shall have actions to recover, as executors, the debts due to the person deceased, and shall answer to others, to whom such deceased person was holden or bound, in the same manner as executors shall answer, and shall be accountable, as executors be, in case of testament, as well of the time past as of time to come." And it is insisted, that this section places administrators upon the same footing as executors, as to their appearing and pleading severally, and having several judgments against them. But I incline to think this is a total misapprehension of the true intent of that section.

It is well known that the office of administrator, as it is now understood, did not exist in the ancient common law. It was

introduced by the 31 Edward III., which makes it obligatory upon the ordinary to depute the next and most lawful friends of the deceased to administer his goods, and in order to enable them to do so, gives them the same actions as executors have, and makes them accountable, as executors are. Without this last provision in their favor, the administrators could neither have sued nor been sued touching the intestate estate; for, as we are told, all the actions which an administrator can have, are given by statute, for the common law took no notice of administrators. Now the section of our act under consideration, is intended merely to supply the place of that ancient statute in this respect, and is expressed in nearly the same words. But unless all lawyers, from the time of Edward III., down till this day, have been mistaken, the statute of Edward never intended to enable administrators to appear and plead severally, and to have several judgments against them. And by all right rules of reason, as our act is made to supply the place of that statute, and nothing more, it ought to have the same construction. It introduces no new laws; it changes no ancient principles. It may fairly be assumed, therefore, that there is nothing in this topic of the plaintiff's argument. The sixth section of the same act, which is also pressed into the service of this argument, says, "that, in actions against divers executors, they shall all be considered as one person representing the testator, and that such as shall be summoned, etc., shall answer the plaintiff and, if judgment be for him, it shall be against those summoned, and also against all the others, of the goods of the testator, as well as if they had been summoned and appeared." This is but a re-enactment, in substance of the 9 Edward III. on that subject; and though it be extended to administrators by the section we have considered, yet it does not at all affect this case, for it is readily admitted that if Freas had put in a joint plea, as well he might, or even suffered judgment to pass by default, that judgment might, and indeed, must, have been against both himself and his co-administrator. But the question here is not, whether upon one being summoned, judgment can be entered against both, but whether they can plead severally, and have several judgment, and I think they certainly cannot. I do not now speak of costs.

2. In the second place, if co-administrators, like co-executors, could plead separately and specially, each for himself, and one should be returned summoned and the other *non est inventus*, and he that was summoned should plead separately (as was

done here) then they would stand in the same situation as in other cases where there is a severance in pleading, and so no judgment could be entered against the other that was not summoned and did not appear, and especially no such judgment could be entered against him as admits assets, and subjects him to the return of a *devastavit*, either upon *fi. fa.* or the *scire fieri inquirendum*.

8. It will follow, from these observations, that, in my opinion, this judgment, so far as it relates to Henry Freas, being a judgment of exoneration, *in presenti*, at least, and so far as it relates to Ann Robinson, being a judgment altogether irregular, and as none, the non-payment of it cannot be assigned as a breach of the condition of the administration bond, in order to subject either them or their sureties to the penalty of it. It is said as this is a subsisting judgment against Ann Robinson, it must have its full force, and be pleadable like all other judgments, until reversed upon writ of error, in due course of law. But if I am right in the view I have taken of it, it is a mere misentry, made incautiously, and without any proceeding to support it, and, like all other misentries of that kind, would be a proper subject of the *breve de corona coram nobis* at the common law. Now I certainly need not cite authorities to show, that in all cases where that writ would lie formerly, the court will now grant the same relief upon motion, or take notice of the error in any future stage of the proceeding which would carry it into effect. They will never give operation, in any form, to a sure misentry.

But whether we consider this judgment against Ann Robinson as a perfect nullity, or as a regular and valid judgment, will make no difference in my view of the case; for I take it to be well settled, that a creditor cannot sue an administration bond, and assign for breach of the condition thereof, the non-payment of a debt upon demand *in pais*, nor even upon a judgment at common law, and a *devastavit* returned upon it. This has been adjudged repeatedly upon the 22 and 23 Charles II., which, in the condition of the administration bond, our act follows *verbatim*, as to all substantial matters, and with which, therefore, it must have the same construction.

It was for some time doubted whether a creditor could sue at all on an administration bond. But even after that doubt was done away, the courts still confined them to the proper objects of the bond.

The first case that I find on this subject is that of the *Arch-*

*bishop of Canterbury v. Brown*, 1 Lut. 892. In that case the defendant pleaded performance as to every particular contained in the condition, and the plaintiff replied, with a *protestando*, that he had not performed, etc., that the intestate was indebted, by a specialty, to the assignee of the bond in so much, and that the defendant, as his administrator, had assets in his hand to pay, but had refused to do so. To this replication there was a demurrer, and the demurrer was sustained, because the ordinary cannot assign for breach of the condition of an administration bond the non-payment of a debt.

In the case of the *Archbishop of Canterbury v. Wills*, Salk. 315, Chief Justice Holt says, "since the statute of Charles II. the condition of the administration bond being to account at a day certain, the administrator must account at his peril, and that without citation on suit; and any party interested may come in and contest it. And whereas, by the words of the condition, he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate, and, therefore, a creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be needless and indefinite."

In the case of *Wallis v. Pison*, Amb. 183, Lord Chancellor Hardwicke says: "Creditors cannot sue an administrator on his bond taken by virtue of the statute of Charles II., for such bonds are only for the benefit of the legatees, the next of kin, and persons entitled to the residue." The meaning of this must be, that the creditor cannot sue, and assign the non-payment of his debt as a breach; for long before that time it was settled that he might sue for an inventory and account.

In the case of *Greenside v. Benson*, 3 Atk. 248, the defendant, Benson, was a creditor of the intestate for three hundred pounds, with interest, on bond. He sued the administratrix at law on this bond, and she pleaded no assets *ultra*, fifty-four pounds, which she paid into court. Upon this there was a trial, and a verdict, that the defendant had assets to two hundred and twenty-six pounds beyond the fifty-four pounds. Benson then took an assignment of the administration bond, and assigned for breach of the condition, that the administratrix had not made a true and perfect inventory, and had judgment by default for the whole penalty. This bill is then brought by the sureties in the bond to be relieved against this judgment, but the lord chancellor ordered it to stand as a security for so

much as the inventory should fall short of satisfying the principal and interest of Benson's bond.

Here it is to be observed, and it is clearly to be collected from the case: 1. That the jury did not find the amount of Benson's debt, on the plea of *plene administravit ultra*, etc., as they were made to do for Jones in the case before us, but merely the fact put in issue, that the administratrix had assets *ultra*, to so much that the assets admitted and the assets *ultra*, found by the jury, when added together, did not amount to the plaintiff's debt; and that the judgment, of course, was for the whole penalty of the bond.

2. That Benson, on his citation on the administration bond, did not assign for breach of the condition, the non-payment of his judgment, as is done here, but the not exhibiting of a true and perfect inventory of the intestate's estate.

3. That upon obtaining his judgment, by default, on this administration bond, he did not proceed to have his particular damages assessed, but was about to take out, or actually had taken out, his execution for the whole penalty; and that upon this a bill was filed in equity, because the sureties had no relief at law.

4. That the judgment for the penalty was to stand, not for the amount of the assets found by the jury in the hands of the administratrix, but for the whole of the principal and interest due on Benson's bond, how far soever it might exceed the assets; for the whole penalty had become forfeited at law, and the chancellor could not relieve against it upon a judgment by default, till the debt was fully satisfied.

In this case the solicitor-general, who argued for the administrators, puts the question, whether a bond taken by the Ordinary, under the 22 and 23 Charles II., relating to intestates' estates, is to be confined to the exhibiting of an inventory for the benefit of the legatees and next of kin, or, whether it extends to creditors also. And he says: as there have been cases determined upon this point, it would be directly encountering them to say, that a bond within that statute may be assigned to a creditor, and that he may assign the non-payment of his debt as a breach. The attorney-general, on the other side, admits this doctrine, so far as it goes to the non-payment of a debt being assigned for a breach, but after examining and animadverting upon the condition of the bond, he draws the conclusion, that a creditor may take an assignment and sue the bond, and assign for breach, that the administrators had not made a

true and perfect inventory, for he is interested in having a complete disclosure of the estate. And the Lord Chancellor Hardwicke, in delivering his opinion, says: "There is no doubt but that the archbishop's commissary, the obligee, may assign a breach, in not delivering a true and perfect inventory, even without a citation; but that what the solicitor-general, the counsel for the administrators, had said, would have been perfectly right, supposing the ordinary had assigned for breach the non-payment of the creditor's debt;" thus establishing the principle, that such debt cannot be assigned as a breach on these bonds.

It is beyond all controversy, therefore, that in the opinion of Lord Chief Justice Holt and Lord Chancellor Hardwicke, a creditor could not assign as a breach of the condition of an administration bond, either a judgment at law against the administrator, with a *devastavit* returned upon it, or the non-payment of a debt upon a demand *in pais*.

In the case of the *Archbishop of Canterbury v. House, Cowp.* 140, there was a rule to show cause why the proceedings upon an administration bond should not be set aside, upon the ground that the archbishop could not depute a creditor to sue; but upon the strength of the case of *Greenside v. Benson*, above cited, as well as upon the reason of the thing, Lord Mansfield discharged the rule, thus affirming the rule laid down in *Greenside's case*, but carrying it no further. And in this case it is clear, from his lordship's argument, that the breach assigned was not the non-payment of a debt, but the not making a true and perfect inventory; for in this, he says, the creditor was most materially interested.

From these cases, adjudged by three of the greatest men that ever sat in the English courts, I think it manifestly appears that though a creditor may sue an administration bond, in order to obtain a complete and perfect inventory and account of the estate, yet he cannot sue it or get judgment upon it for his own individual debt.

But suppose it were otherwise, and that the creditor could assign for breach the non-payment of his own debt, and could recover a verdict and judgment for the amount, what purpose would it answer to him? The money recovered is not to be paid to him; it is not to go to the payment of his debt exclusively; it is, by the very words of the act, "to be applied towards making good the damages sustained by the not performing the condition in such manner as the judge of the pre-

rogative court shall by his sentence and decree direct;" that is, not the damages of the assignee of the bond only, but of all the other persons interested in the estate; for if it were of the assignee only, there could be no need of the interference of the judge of the prerogative court, or of any sentence or decree about it. The money recovered, therefore, must be applied by the judge of the prerogative court to the payment of all the debts of the intestate in their order, giving a preference to those that have a preference by law, and making a ratable distribution among all others. This is certainly the course of the ecclesiastical courts in England, which must necessarily have been the contemplation of the learned judge who drew this act. To show the more clearly that the application of the money recovered in these actions must necessarily be to the payment of all debts, let us pursue the thing a little. Let us suppose the administrator to have wasted the whole estate, and to be himself insolvent, and that there is nothing to respond to creditors but the administration bond, shall he that can first get the assignment of it, and a verdict and judgment for his debt, even though it be a simple contract debt, swallow up the whole penalty, take the whole money recovered to himself, and leave all other debts, even of a superior order, unpaid? This, I think, would be hardly maintained by anybody; and it is to prevent this that the money recovered must be distributed by the judge of the prerogative court. What, then, is to be done upon such a recovery? Is the judge of the prerogative court to divide the sum so recovered among all the creditors, and so pay the assignee of the bond but a part of his debt, and then put every other creditor to go through the same course, and make like division of what he may recover? and if it be an estate in which there is a surplus, shall he, after all, compel the next of kin to run the same race? This would, indeed, as Lord Chief Justice Holt says, be needless and indefinite.

But it is not so. No such breach can be assigned. No such recovery can be had. The law runs itself into no such absurdity.

The condition of an administration bond requires principally three things: first, to make a true and perfect inventory and appraisement of the goods, chattels and credits of the deceased; secondly, to administer the same according to law, and make a just and true account of such administration, which, according to Lord Holt, is one and the same thing, for the settlement of the amount implies the just administration of the goods, and



the payment of the debts, without which it cannot be made; and thirdly, to pay over the surplus to the next of kin, upon refunding bonds. A failure in any of these three things may be assigned, by a creditor, as the breach of the condition; but I am not at present, aware of any other thing which can be so assigned. In all these cases, if the breach be proved, the recovery must necessarily be of the whole penalty; and the party against whom it is, has no relief except in the court of chancery, and not even there without showing a complete administration of the estate. And, as the law, when well understood, is perfectly reasonable and just in all respects, so it is in this also. The penalty of the administration bond is calculated upon a general estimate of the property of the deceased; the administrator and his sureties agree to this estimate and condition as completely covering the value, and no more; the administrator alone collects the goods and sells them; he recovers the debts and receives the money; he alone knows the condition, the particulars, and the amount of the estate; he refuses to exhibit an inventory, or to give an account; what can be more reasonable, then, than that he and his sureties should pay the penalty; which is but the estimated value, and estimated by themselves too, for the benefit of creditors and others entitled? It is true that this penalty and the recovery upon it, is generally used only as a rod upon the back of the administrator, to compel him to do his duty; and if he do so satisfactorily to the ordinary, even though out of time, it will not be exacted; and especially here, where, by the administration, the same person is both ordinary and chancellor. But this does not change the principle.

I remember a case at the Sussex circuit, some years ago, in which the plaintiff had assigned for breach on one of these bonds, that the administrator had not made a just and true account of his administration, and upon this assignment he would have gone into proof of his debt, and of the property which came to the hands of the administrator, and the value of it, in order to show that he had sufficient to pay, but I refused both the one and the other, and it being proved that there was no account settled, I directed the jury to find the whole penalty, which they did do accordingly. Upon this, though it was submitted to, I heard a little murmur at the bar, which induced me to look into the matter the more fully at chambers, and the investigation which I then made, fully satisfied me that the direction was right, and that upon such an assignment there can be

no proof of the debt, or of the amount of the estate which came to the hands of the administrator, or other matter which would put upon the jury anything like an estimate of the estate, or a settlement of the account. All that belongs to another tribunal.

It has been said, in the course of the argument, that as this plaintiff has a just and undisputed debt, and as the estate of the intestate, as it came into the hands of the administrator, was abundantly sufficient to pay all demands against it, it would be a hard thing, indeed, if the law did not afford him a remedy. I would answer this by saying that the law does afford a complete remedy, but that, in my view of the case, the plaintiff has not pursued that remedy.

If the settlement made in the orphans' court of the county of Salem, in December, 1809, was a final settlement, that is, a making of a just and true account of the administration, according to the condition of the bond, and if a confirmatory decree of the said court was passed upon it, as from the case submitted, we are ready to believe, then, the balance found in the hands of the administrators, was a surplus to be distributed according to the statute, for there can be no such final settlement until all the debts known, exhibited and allowed, are satisfied and paid, because settlement, as well from the force of the term, as according to the cases cited, implies payment. If the administrators, therefore, did pay out the balance found in their hands, upon debts not exhibited at the time of the settlement, or did make such distribution to the next of kin, of the balance or surplus found in their hands, and did take and file such refunding bonds, they have done their duty and saved themselves and their sureties from the penalty of the administration bond, and this creditor, probably, has no remedy but against the next of kin on their bonds to refund, but if the administrators did not do so, he may assign that for breach, and recover against them and their sureties. On the other hand, if the settlement, stated in the case, was not such final settlement, but a mere exhibition to show the condition of the estate for other purposes, then this creditor may assign for breach of the condition, the not making a true and just account of the administration, and upon that assignment may recover the whole penalty for his indemnification.

Upon the pleadings, however, as they are entered in the record, and upon the case stated for the opinion of the court, I think there must have been judgment for the defendant; but inasmuch as the case is in some degree a new case, and the law

has not been so well settled as it might have been, I am disposed to let in the plaintiff to amend his replication and assignment of breaches, so to form an issue which may be within the view which I have taken of the case.

N. B. How far he can be relieved, after all, without first establishing his claim at law by a regular and valid judgment against the administrators, it may be proper for the plaintiff to consider.

ROSELL, J. This was a suit brought on the administration-bond of Robinson and Freas, administrators, and Van Mater and Powell, sureties, by a creditor, to recover the amount of a judgment on a bond held by him against the testator. The administration-bond was taken in conformity to our statute, passed in 1795, Pat. 1546, sec. 11. In the condition of said bond, it is proved "that administrators should make a true and perfect inventory of all the goods, chattels, etc., of the intestate, and well and truly administer according to law, and make a just and true account of their administration, etc., and deliver and pay unto such person or persons respectively, as is, are, or shall by law, be entitled to receive the same."

This language appears sufficiently comprehensive to secure the interests of all who have a legal right to expect a benefit from the estate of the intestate, whether creditors or next of kin, entitled to a distributive share. An administrator is to sell the personal estate of the testator, to recover debts due, and pay all legal demands against it, and settle his accounts in the orphans' court, that distribution of the remainder may be made to those who by law are entitled to it. And should any person suppose himself aggrieved by a non-performance of those conditions, his legal remedy would be a prosecution on the bond. But it is alleged by the defendants that this bond is given for the benefit of the next of kin only; that it is copied from the statute 22 and 23 Charles II. chap. 10; and that the construction given by the English courts to that statute will be necessarily followed by this court; and no creditor as such can, in England, prosecute on such bond, and assign as a breach of the condition the non-payment of a debt or a *devastavit*. In support of this position, they cite 3 Mod. 61; 1 Salk.; Amb. 183; 2 Burn's Eccl. Laws, 641; Toller's Law of Executors, 496. In 3 Mod. 61, the passage relied on by the defendant, it is said, "there can be no remedy on the bonds of administrators, until the ordinary hath appointed distribution." If this was ever law, it has since been overruled, as the right of persons inter-

ested, even creditors, to sue on such bonds in the name of the ordinary, to compel the administrator to file an inventory of the intestate's estate, has been repeatedly recognized. In Toller's Law of Ex'rs, 496, it is laid down the words "he (the administrator) is well and truly to administer," are construed to apply merely to the bringing in of the inventory. It is then added, "creditors have no right to sue on the bond, for the court cannot compel the payment of the debt." The writer, is speaking of the ecclesiastical court, which had no common law jurisdiction, nor power to interfere as between creditor and debtor. Amb. 183: Lord Chancellor Hardwicke says, "that creditors cannot sue an administrator on bonds taken by virtue of the statute of Charles II., for such bonds are intended only for the benefit of the next of kin, and persons entitled to the residue." 1 Comyns cites only the case from 1 Salk. 316. It is laid down "that he shall well and truly administer, shall be construed in bringing in his accounts, and not paying the debts of the intestate; and therefore, a creditor shall not take an assignment of the bond and sue it, and assign for a breach the non-payment of a debt due to him on a *devastavit*, for that would be needless and infinite."

These authorities are, apparently, founded on the statute of the 22 and 23 Charles II., and in aid, it is said, of some authorities of the ecclesiastical court. That statute was passed in 1670, for the better settling of intestate estates, and declares that all ordinaries and ecclesiastical judges, having power to grant letters of administration, shall take bonds of the administrators so appointed, with two or more able sureties in the name of the ordinary, in the form of which ours is a copy.

And the said ordinary shall call such administrators to account for and touching the goods of any person dying intestate, and make a just and equal distribution of what remained clear (after all debts first allowed and deducted) among those who by law are entitled to it, and compel such administrator to pay the same by the due course of the ecclesiastical law.

The eighth section enacts, to the end, that due regard be had to creditors, that no distribution shall be made until a year from the testator's death has expired, and that those to whom any share is allotted, shall give bond with sureties to pay back to the administrator, in ratable proportions, any debts that shall after appear to be due from the estate of the testator, to enable him to pay the same.

In 1677, the 30 of Charles II., an act was passed to enable

creditors to recover their debts of executors and administrators of executors and administrators in their own wrong, who had been possessed of, wasted or converted to their own use the personal estate of other dead persons, in the same manner as they might have done if their testator or intestate had been living. And in the 4 and 5 of William and Mary, this act was revived and extended to executors and administrators of executors and administrators of right.

In 1685, fifteen years after the 1 of James II., the statutes of 22 and 23 of Charles II. were revived and made perpetual and enlarged, provided always that no administrator shall be cited to any courts in the last named acts mentioned, viz., the prerogative and other ecclesiastical courts, to render an account of the personal estate of his intestate, unless it be at the instance or prosecution of some person in behalf of a minor, or having a demand out of such estate as creditor or next of kin, nor be compelled to account before any of the ordinaries or judges, otherwise than as aforesaid.

The foregoing are the acts of the parliament of England on which the decisions relied on by the defendants are founded, but even there, in Cowp. 140, Lord Mansfield says: "I see no authority which says the ordinary cannot empower a creditor to sue on an administration bond; on the contrary, he ought to do so; for although a creditor has no concern in the latter part of the condition distribution, yet he is most materially interested in the administrator's delivering a just and true inventory and the due administration of the effects." This doctrine is also recognized in 3 Bac. Abr. tit. Executors and Administrators.

The province of this court would be, on this statute of Charles II., to settle the question between these contradictory authorities, if, indeed, it can be raised in New Jersey; but this I do not think necessary. Although our form of an administration bond is copied from that in Charles II., yet our statute is much more comprehensive, and couched in different terms. And it would appear that our legislature, in 1784, when about to define the authority of the ordinary, his surrogates, etc., and to establish orphans' courts throughout the state, had another class of citizens in view beside those who claimed a distributive share of the residue of an intestate's estate, viz., creditors, and that they were equally entitled to justice and protection; they therefore make them parties in interest in the due administration of intestates' estates. In the eighth section they provide that the orphans' court shall have power, where letters of administration

have been granted, or on sufficient security, after hearing the objections of creditors, all persons concerned, to order such administrators to give such further security to the ordinary, by bonds in usual form, as the said court may approve of, or neglect to revoke the letters of administration, and the ordinary or surrogate to grant letters to such persons having a right as will give bonds in manner aforesaid.

The tenth section enacts that an executor or administrator may, on sufficient reason, call on his co-executor or administrator to account for all assets that have come to his hands, and the court may compel such executor or administrator to give security to his co-executor or administrator for the payment of the balance remaining in his hands to creditors, legatees, or representatives of the testator or intestate; and on refusal, to authorize the executor or administrator to sue for such assets in the hands of the refusing executor or administrator.

The sixteenth section provides that the surrogates shall audit and state the accounts of executors and administrators, they having advertised their intentions for two months, and report the same to 'the orphans' court. But if any person interested make exceptions, etc., provided, always, that in all cases where it shall appear that the executor or administrator hath not sufficient assets to satisfy just debts and expenses, the court shall not decree an allowance of the account until the next term, nor till proclamation at that and the subsequent court for all creditors and others interested to appear and show cause, etc.

The seventeenth section makes the decree of the orphan's court, on the final settlement, conclusive to all parties, and forever discharges the executors or administrators from all demands of creditors or others, except for assets coming to their hands after settlement for fraud or apparent mistake.

In the twelfth section of the act concerning executors, administrators, and distribution of estates, it is enacted, that administrators shall give bonds; and, in case they become forfeited, it shall be lawful for the ordinary to cause the same to be prosecuted in any court of record, at the request of any party aggrieved by such forfeiture.

The twentieth section enacts, that no executor or administrator shall be cited to render an account otherwise than by inventory, unless at the instance or prosecution in behalf of a minor, or one having a demand out of the estate as a creditor, or next of kin, etc.

It appears, from an examination of the two foregoing acts, that our legislature were careful to protect creditors, as well as the next of kin, from the unlawful acts of administrators, in wasting the estate of the intestate. They could not be ignorant that many persons died insolvent as well as intestate; and in that case no next of kin, merely as such, could have an interest in the estate; that a person of little or no property might obtain letters of administration, and waste the whole estate, or abscond, and were the creditors the only parties in interest to be without the shadow of a remedy, with their hands tied up from prosecuting for their rights, by the law giving six months to such administration, in which to ascertain the amount of the debts, etc., of the intestate? I think not. The legislature, as wisely as justly, took a more enlarged view of the whole subject, added sundry provisions not found in the English code, and thus threw off the shackles that an individual opinion on a new and imperfect law had thrown around some after decisions of the English courts, and provided a security to all concerned, creditors as well as others, that the estate should be in good faith duly administered. This security was the bond; there was no necessity to alter the form of that of Charles II., the language was appropriate and amply sufficient to fulfill the intentions of the legislature. If creditors were not in legislative contemplation to be secured by this bond, why give them authority to call on the court to compel administrators to give further security in cases where they supposed it was not sufficient, or why are they so repeatedly mentioned throughout the statutes, and first named as entitled to a preference over those who had claims only to the residue. For these reasons, I am satisfied that, in New Jersey, a creditor has a right to sue an administration bond, he having the proper authority from the ordinary so to do.

Since writing the above, I find myself supported by a decision in 18 John. 437, where it was determined that a creditor might sue on an administration bond; also in 9 Mass. 117; 1 Wash. 31. I think, therefore, the breach assigned in the plaintiff's declaration for the non-payment of the money due him is well assigned, and the alleged breach of the condition supported.

Another point was raised on the argument, viz: that it appears on the record of the orphan's court that Jones had fully settled for all the assets that came to his hands, although a large balance remained in the hands of his co-administrator, and that, therefore, judgment could not go against Jones. If

Freas had not been a party in this joint bond the objection might have prevailed. But the obligors on a joint bond are equally liable on the forfeiture of the condition. Indeed, Freas has the less reason to complain; he knew, or ought to have known, the amount of the intestate's estate, and in whose hands it was; and if the debts were not paid, he should have taken the measures pointed out by the act to compel his co-administrator to account and pay out of the balance in her hands, the just demands of the creditors. I am, therefore, of opinion that judgment be entered for the plaintiff for the penalty of the administration bond.

FORD, J., concurred with the chief justice.

Therefore there was judgment for the defendant, with leave given the plaintiff to amend.

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Approved in *Williamson v. Snook*, 5 Hal. 65, 66, 74; Chancellor Pennington, however, in *Hansen v. Durling*, 1 Green's Ch. 136, holds that the principal case and *Williamson v. Snook*, were designed simply to settle the course of practice in a suit on an administration bond. He says: "They do not deny the doctrine that a creditor may sue the bond, but decide that he cannot assign as a breach the non-payment of his debt. The breach assigned must be that that the administrator has not made a true and perfect inventory, or has not administered the estate according to law. Under this last breach, the not paying the debts of the intestate are [is] embraced. These cases relate to the forms of proceeding in the common law courts on the administration bonds, and are not designed to vary in any way the general principles of law relating to the liabilities of parties under them. I see nothing in these cases that looks like a denial that a creditor may, in proper form, obtain his remedy on the bond, and that it is a security to him as well as to the next of kin. In the case now before me the suit on the bond is evidently brought under the decision in 1 Halsted. The breaches assigned are, for not filing an inventory, for not administering the estate according to law, and for not making a just and true account of the administration. The bill charges that sufficient assets came to the hands of the administrators of Darling to pay all his debts. The answer admits that he left considerable personal estate, but professes to be ignorant of the amount. The proofs in the cause show a balance unadministered in the hands of the administrators of two thousand eight hundred and sixty-four dollars and forty-two cents, on the settlement of their accounts in the orphans' court. In adjudging, therefore, this bond to have been forfeited, there is no conflict with the decisions before referred to."



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**MILLER v. HELLER.**

[T SUGGENT & RAWLS, 32.]

**SPECIAL WARRANTY.**—Land was purchased at a sheriff's sale as the property of a party then in possession. The purchaser conveyed the land with a covenant of special warranty against himself and those claiming under him, and gave a bond conditioned that he would deliver peaceable possession to his vendee or heirs at a certain date, and for ever defend against the party then in possession, and all and every person attempting to hinder the said vendee or his assigns. The purchaser recovered possession by ejectment, and delivered the possession to his vendee, who was afterwards ejected by a person claiming under the party in possession at the time of the sheriff's sale. It was held that the condition of the bond was not broken.

**Action of debt brought by Joseph Heller and John Arter, executors of John Heller, deceased, against Jacob Miller, surviving executor of George Miller, deceased, upon the following bond:**

"Know all men by these presents that I, George Miller, of Windsor township, in the county of Berks, and state of Pennsylvania, yeoman, am held and firmly bound unto John Dieter Heller, of Lower Sancon township, in Northampton county, and aforesaid state, yeoman, in the sum of one thousand pounds, gold and silver lawful money of Pennsylvania, to be paid to the said John Dieter Heller, or to his certain attorney, his heirs, executors, administrators, and every one of them, firmly, by these presents, sealed with my seal, dated the twenty-ninth day of December, A. D. 1789:

"Whereas, George Miller, abovesaid, by a certain assignment on a deed executed by the sheriff of Northumberland county, to him, the said George Miller, for certain premises

therein described, did grant, bargain, sell and convey the said premises by a warranty, in said assignment mentioned, unto him, the said John Dieter Heller, and to his heirs and assigns forever. Now the condition of the above obligation is such that if the above-bounden George Miller, or his heirs, shall, and do deliver peaceable possession of said premises to said John Dieter Heller, or his heirs, at or before the fifteenth day of April, now next, and warrant and defend the said premises against the present possessor, Mounce Jones, and all and every person attempting to hinder said John Dieter Heller, or his assigns from taking possession thereof, so as aforesaid, and against said George Miller and his heirs and assigns, then the above obligation to be null, or else to be and remain in full force and virtue at law.

GEORGE MILLER."

The parties went to trial on the merits, without regard to the pleadings. It appeared that George Miller had purchased certain land at sheriff's sale as the estate of Mounce Jones, and obtained the sheriff's deed on the fifteenth of June, 1789. On the sixteenth of November, Mounce Jones being then in possession, George Miller made an assignment to John Dieter Heller of his title and interest in the land, with a covenant of warranty against him and his heirs and all claiming under him or them. George Miller brought an ejectment against M. Jones, in which he recovered possession and delivered it to John Dieter Heller. Afterwards John Dieter Heller was ejected by Nicholas Jones, who claimed under M. Jones.

Two questions arose: 1. As to the extent of the covenants in the condition of the bond; 2. As to the damages.

*Evans and Hopkins*, for the plaintiff in error.

*Baird and Buchanan*, *contra*.

By Court, DUNCAN, J. This was an action of debt on bond, in the penalty of one thousand pounds with the following condition [reciting condition]. The parties went to trial on the merits by agreement, without regard to the pleadings.

The argument was principally confined to the exceptions to the charge of the court, and branched out into two heads of inquiry. The first was on the extent of the covenant in the condition; the plaintiff in error contending that this only related to the delivery of possession, on the fifteenth of April, 1790, its purpose being only to protect Heller from interruption in taking possession by Mounce Jones, or any other person, and contained a covenant against George Miller and his heirs only as to the

title. The conveyance referred to in the bond was barely an assignment of the title and interest of Miller with a covenant of warranty against him and his heirs, and all claiming under him and them. The defendants contended that the covenants were for quiet enjoyment, and warranty against Mounce Jones, and all claiming under him, and that as the testator was evicted by Nicholas Jones, the covenants are broken.

The second was, the measure of damages; the defendants in error contending that the bond was given for indemnity, and therefore they were entitled to all the damages they had sustained; that it was intended to keep them whole, a stipulation for actual compensation, and to satisfy them for the real value of the land, with all its improvements, on the day of eviction, and all costs in defending the possession and title. It was admitted that if the pleadings had been drawn up at large, the breach assigned would have been the eviction by Nicholas Jones claimed under Mounce Jones, and likewise that George Miller claiming under Mounce Jones. It was further admitted, that Miller recovered in full against Mounce Jones, and delivered possession to Heller. While the plaintiff insists, that if the eviction falls within the covenant, it should be considered entirely as a covenant of warranty, in which the value at the time of conveyance, the money paid with interest, without relation to the rise in value or the improvements made by Heller could alone be recovered. If the court should be of opinion with the defendant on the first point, it will become unnecessary to give one on the second, as that goes to the foundation of the right to recover anything.

There is one rule which enters into the construction of all deeds; they are to be construed agreeably to the intention of the parties, "and that intention ought to be adjudged of the several parts of the deed, as a general issue out of the evidence. Intent ought to be picked out of every part, and not out of one word only." Winch. 98. At present the chief object of courts of law is to discover the true meaning of the parties to any contract, and to construe it accordingly. It is proper to consider the state of the parties and the property, when the bond was given, and determine from that and the whole condition, the purpose for which it was given, without rejecting any word, if consistent effect can be given to it. George Miller had purchased the land, as the estate of Mounce Jones, and obtained the sheriff's deed on the fifteenth of June, 1789, and conveyed to Heller, on the sixteenth of November, Mounce Jones being then

in possession. On the twenty-ninth of December, he gave this bond, by which he bound himself to deliver possession on or before the fifteenth of April, following.

One thing we are assured of, that is, that George Miller never intended to warrant the title further, than as against himself and his heirs, and all claiming under him and them, for such is the special nature of the warranty in the assignment, and such is the concluding covenant in the bond. Now if the covenant was a general covenant as to quiet enjoyment it would be quite inconsistent with the restricted covenant of warranty, as to the title; for then it must be said that he intended to give a limited and an unlimited warranty. Our object is to find out what is the meaning of the parties, without any regard to the place in which the covenants stand in the instrument, or attention to grammatical rules.

So far as respects the title, Miller had entered into all the covenants he had intended. He had not, and he could not give immediate possession; for Mounce Jones held that; and the purpose of the parties, when the bond was given, was to secure the delivery of Jones's possession to Heller. The condition is: "The said George Miller or his heirs shall, and will, deliver possession of the said premises to John D. Heller, at or before the fifteenth April." This is one covenant; "And warrant and forever defend the said premises against Mounce Jones, the present proprietor, and all and every person attempting to hinder said John D. Heller from taking possession thereof so as aforesaid," is another distinct covenant; "and against the said George Miller, and his assigns," is a third covenant. These two last covenants are contained in one sentence, and throughout the sentence the warranty runs. It would be an unreasonable supposition, that George Miller intended to enter into a perpetual covenant against the tortious entries of Mounce Jones and all the world. For if the defendant's construction be a just one, it would include all hindrances, legal or illegal, by all persons, and to the end of time. This cannot be the fair construction of this instrument. The obtaining possession was the main design, and the whole of the first and second covenants refer to the possession. To the taking of possession as aforesaid, Mounce Jones and all and every person and party stand in the same relation as to this covenant.

The covenant was a special covenant respecting the taking the possession as aforesaid; that is, at the time George Miller covenanted to deliver it; and is an express covenant on the

part of George Miller, that he will warrant that neither Mounce Jones nor any other person, should attempt to hinder Heller in taking possession on the aforesaid fifteenth April. It is not at all probable or in any way to be accounted for, that this man, who was so cautious in warranting the title, should enter into covenant, to warrant and defend the possession forever.

It is of some weight with me, that every covenant respecting Mounce Jones, is personal to him by name, and to him as the present possessor. I cannot suppose that this was accidental and not intended to confine it to him, when in the same sentence, the covenant as to title is against George Miller and his heirs and assigns, and not against him alone. I do not say, that if from the whole context it appeared that the parties intended a perpetual covenant against Mounce Jones, and all claimers under him, but that the law might so construe it. But here there is nothing which would irresistibly force this inference, but quite the contrary; and the court ought not to indulge parties in carrying out words, which are ordinarily introduced, and by which the real meaning of the parties might be understood; and this is increased by the omission in one covenant and the insertion in another.

A covenant for quiet enjoyment is very different from one warranting that the grantee should meet with no hindrance in taking possession at or before a stated day fixed by the instrument. No breach of the covenant is alleged. It must be taken that it was not broken, and that neither Mounce Jones nor any other person hindered him from taking that possession. I cannot put any other construction on these words than that George Miller says: "I will not covenant for the goodness of my title, but I will covenant to deliver to you possession on the fifteenth of April; and will warrant, that in taking possession you shall not be hindered by Mounce Jones or any other person." Taking possession is one act, and not a succession of acts, and does not signify a continuance of possession. And George Miller says: "I will not enter into any warranty of the possession; I will not defend against any disturbance or interruption, except it is by myself, or my heirs and assigns; I will undertake to put you in possession, but not to keep you there." The present possession of Mounce Jones, and the delivery of the possession was all that was in view of the parties, or scope of the covenants. Looking at the instrument, this is the construction, and there is nothing so doubtful or ambiguous in the covenants as to require the conduct of the parties to be called

in to impose a different construction; there is no express covenant for quiet possession or enjoyment, and so material a covenant cannot be implied or added to it by the conduct or declaration of the parties. Courts, both of law and equity, constantly advert to the situation of the parties and the property, in order to enable them to construe ambiguous and ill-penned instruments; but it is now clearly settled that in the construction of a deed or agreement, the acts of the parties cannot be taken into consideration: Sugden, 118; and parol evidence of the intention of the parties ought not to have been received. On the first argument, the acts of Miller, and his declarations, had their influence in the view which I then took of these covenants, and I was, I acknowledge, disposed to consider that in this case the parties themselves had put a construction on these covenants, and were therefore bound by it. I am now satisfied this view was erroneous, and that all this evidence should be disregarded, and have no influence on the construction of the bond. The clause respecting the possession is one; but if they were distinct, the second would be consequential to the first. The just rule of construction will be found in 1 Saund. 60; it is this: where any sentence contains distinct covenants, and there are words of restriction, either in the prefatory or concluding part, these words must be extended to every part of the sentence, unless the intention of the parties appears to require a contrary construction. There are many decisions confirming this rule, and some of them of a very early date. In *Broughton v. Conway*, Moore, 58; Dyer, 240, a condition that vendor had not done or would do any act to disturb the vendee, but that he should hold and enjoy, without the disturbance of vendor or any other person, was confined to acts done by the former, because the latter words were referable to the former; and it is no breach if the assignee be disturbed by the act of any other person, if it be without the act of the assignor: Powell on Cont. 403. So, if one covenant that lands are of the value of one thousand pounds per annum, and so shall continue, notwithstanding any act done or to be done by him, the words "notwithstanding any act" extend as well to the time of covenant made as to the time future; and though they be not of that value, the covenant will not be broken, except some act done by the covenantee be the cause of it.

*Rich v. Rich*, Cro. Eliz. 43; and *Grevis v. Peade*, Id. 615; and again in 3 Lev. 46, there were four covenants: the first for seizure in fee, the second for right to convey, the third against in-

cumbrances, and the fourth for quiet enjoyment. The first, third and fourth covenants were expressly restrained to the act of the grantor, his father and grandfather, and the second was unrestricted. The whole court agreed that the covenants were distinct and several, and three justices, in opposition to North, C. J., held the first and second covenants were synonymous, and, therefore, as the grantor had covenanted against his own acts, it could not be intended that he should immediately afterwards covenant against all the world.

A series of decisions has fixed a principle, that however general the words of a covenant may be, if standing alone, yet if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words of any covenant in the same deed. The question therefore always is, whether such irresistible inference does arise from concomitant covenants; if it does they will control the general words of the covenant. It is not required here to restrain general expression by concomitant restrictive ones, for there is no general covenant for quiet enjoyment or against disturbance, but a special one, respecting the taking possession, and not a covenant against interruption or disturbance of the possession when it was acquired.

It was not asked by the plaintiff in error to restrain a general covenant by inference, and prune it down to a special one; but the defendants in error require a construction to change a special covenant and enlarge it into a general one, and introduce other covenants by inference, whilst so far from being a necessary inference, there is an irresistible inference to the contrary.

"Against Mounce Jones and all other persons attempting to hinder John D. Heller from taking possession thereof, so as aforesaid will warrant and forever defend." To ascertain the sense of this we have only to look to the line of the "instrument next above, that explains the general expression as aforesaid," and shows it to be a taking possession at or before the fifteenth April. If this was a general covenant for quiet possession and enjoyment, what would be the use of any other restricted covenant, for this would supersede them all, for a grantee might say, "I cannot sue you on the covenant for title, but I have a cause of action on a general covenant for perpetual possession and quiet enjoyment." Taking possession is one act, limited here to a point of time; quiet enjoyment includes everything, and is perpetual; into a covenant for the latter

George Miller did not enter; into the former, he did, and that he fulfilled. If there had been a general covenant for quiet enjoyment separate and distinct from the covenant for delivery of possession, it perhaps would not have been restrained by the restrictive covenant, as to the delivery of possession, for that would be a covenant of a materially different import, and directed to a different object. The covenant for quiet enjoyment is the assurances against the consequences of a defective title, and of any disturbances therefor, and if he be lawfully evicted, the grantor, by such covenant, stipulates to indemnify him at all events. But the covenant for delivery of possession, and that there shall be no attempt to hinder him from taking possession at or before a particular day, is a quite different covenant; it is a covenant against all acts of interruption, legal or illegal, with or without title, in taking the possession at the time stipulated, and when the possession is taken without interruption, that covenant has performed its office and has no continuing obligation. It has been with great earnestness pressed on the court that this bond has received a construction by this court in the case of *Heller v. Jones*, 4 Binn. 61.

This is not so. The bond is called an indemnifying bond. The bond itself was not given in evidence, but in order to connect Miller and Heller in the action, *Nicholas Jones v. Mounce Jones*, and in the defense set up by Miller, to show a fraud in the *scire facias* on the judgment, between the plaintiff and defendant in the proceedings, and that the whole was a contrivance to defeat George Miller of his judgment, and from the circumstance to draw the conclusion that at the trial on the *scire facias* Heller was virtually a party, and that this defense being set up in the suit, and a verdict against it, the verdict was conclusive between all parties and privies. Notice had been given Heller to produce this bond; he did not produce it, and evidence was given that when Miller sold to Heller, he gave him a bond to indemnify him; but the bond was not given in evidence, nor parol evidence of its contents, otherwise than by the witness testifying that Miller had given Heller a bond of indemnity against the claims of others. If the witness was under mistake as to the nature of the indemnity, Heller had an opportunity to show that mistake by producing the bond itself. But for the purpose it was introduced, this bond would establish the connection with its special covenants equally as if it had contained general covenants. The case reported very fully shows that this bond and its conditions are



now for the first time to receive a judicial construction in this court; and the court are of the opinion that there was error in the court of common pleas in deciding that this breach, the eviction by Nicholas Jones, was within any of the covenants in the condition of the bond.

This makes it unnecessary to decide on the measure of damages which should obtain on a bond with a penalty, conditioned to warrant either title, perpetual possession, or quiet enjoyment, because the plaintiff in error is not liable at all, and there is no cause of action, no breach assigned on record, falling within any of the covenants; and it would be giving an extra judicial decision in a very important question, which ought always to be avoided. The judgment is therefore reversed.

Judgment reversed.

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## SHARE v. ANDERSON.

[7 SERGEANT & RAWLE, 43.]

**VENDOR'S DECLARATIONS.**—A declaration by a vendor, evincing a disposition to defraud, cannot be used as evidence against him in a different and subsequent transaction with another, not then in contemplation.

**COVENANTS IN DEED DISPLACE PAROL PROMISES.**—Parol representations at the time of execution are merged in a warranty against incumbrances, and cannot be shown in an action for the purchase-money, where they are not alleged as proof of fraud.

**EVICTIO TO SHOW BREACH.**—To entitle the vendee to relief against the payment of the purchase-money, on the ground of incumbrances, an actual eviction at law need not be shown.

**LIEN IN FAVOR OF HEIRS.**—Where land is decreed to one heir, by order of the court, the purchase-money due the other heirs is a lien on the land; but a release by the children of one of these heirs who is dead, is binding in equity, and on every one except creditors, at law.

**ACKNOWLEDGMENT OUT OF JURISDICTION.**—A justice of the peace cannot do an official act, or exercise a judicial function, out of his district, and therefore an acknowledgment by a *feme covert*, taken in one county before a justice of the peace of another county, where the land lies, is void.

**ELECTION OF WIDOW EVIDENCED BY SUIT.**—Where a widow joins as executor in a suit for the purchase-money for land conveyed by a deed which she had defectively acknowledged, the invalidity of the deed is no bar to a recovery; for by suing she makes her election, and a recovery will bar her right to dower.

DEED brought by Mary Anderson and others, as executors of James Anderson, against Henry Share and Christian Hershey, senior, to recover the amount due on a bond executed by Henry Share and Christian Hershey, to the said James Anderson, for

the payment of fifty thousand dollars, with interest from the first March, 1814. The sums of six hundred dollars and seven hundred dollars had been paid and credited on the bond.

Notice was given that the following matters would be specially offered in evidence: That the title of the plaintiff's testator to the said lands, was defective and incumbered at the time of the sale to the defendant, and continued and still is defective; that the defects in the title and incumbrances upon it were concealed by the plaintiff's testator, at the time of the contracting, and when discovered he assured the purchaser, that he should not suffer, for he would at once have them removed, and, therefore, the contract was completed; that it was fully explained and made known to the plaintiff's testator, that part of the lands purchased was for a town plot, to be laid out in lots, and that a complete title was desired and indispensable, and such was promised and assured; that upon the faith of these assurances, the ground plot was laid out for a town, extensive sales made, all of which were rendered inoperative by the defendant not getting a clear title. In consequence of such failure of title, the plaintiff's testator lost the principal object of the purchase; and, therefore, he claims compensation or a return of so much of the purchase-money as will reimburse him for losses.

Various witnesses were called, whose testimony, as far as material, appear from the opinion.

The jury found a verdict for the plaintiff, on which judgment was rendered, and a writ of error thereupon taken, the grounds of which appear from the opinion.

*Buchanan & Hopkins*, for the plaintiffs in error.

*Jenkins and Rogers*, contra.

By Court, GIBSON, J. In the court below the defense was put on a supposed fraud of James Anderson, the plaintiff's testator, in procuring Henry Share, one of the defendants, and the principal in the transaction, to purchase the land for which the bond was given, on the breach of a collateral agreement by Anderson to procure, within a specified period, certain incumbrances on the property to be extinguished; on the existence of some of those incumbrances, still as outstanding, and on a defective acknowledgment of the deed of conveyance by Anderson's wife, who is now an executrix of his will, and a plaintiff in the cause. Under some of these heads, may every principle be ranged, which the court was called on to decide.

As to the first, the defendants had the benefit of their allega-

tion to the extent of its value as supported by the evidence. The jury were instructed that if Anderson, the vendor, took pains to conceal the incumbrances from Share, and thus induced him to accept a deed which he would not otherwise have done, it was such a fraud as entitled him to rescind the contract altogether, but the judge at the same time expressed an opinion that the defendants had failed in their proof, and whether in this he were right or wrong, is not for us to inquire. But an exception was taken to the rejection of evidence, to prove that a short time previous to the date of the articles, Anderson had offered to sell the property to the witness, who observed he understood there were incumbrances on it, but that he did not believe it, and that Anderson replied, that they who said so knew no better, for there were none. Now how this declaration, even granting for the sake of the argument, that it evinced a disposition to cheat the person to whom it was made, could be called in aid of evidence of fraud in a subsequent and distinct transaction not even then in contemplation, is what I cannot comprehend. In this part of the case, therefore, I discover no error.

Under the second head, a breach of the parol agreement was insisted on, not as failure of consideration of the bond, but as special damage collateral to the consideration, which, therefore, could operate, if at all, only as a set-off. It is unnecessary to decide whether, under the pleadings, a distinct substantive cause of action could be urged as a set-off, as it is clear the parol promise could, under the circumstances of the case, have no operation in any shape. It was not pretended that this part of the defense was connected with the allegation of fraud; but it was urged on the ground of the abstract effect of the promise itself, which, from its nature, carries with it an assertion of notice, and precludes the idea of Share having been unapprised of the existence of the incumbrances at the execution of the deed, or even at the date of the articles.

Dr. Watson testified that immediately after the articles were signed, he informed Share, at the request of Anderson, that there were liens, on which Anderson said he would procure releases of them, and that, at all events, Share would be no loser by want of them; and Leibhart swore, that immediately before the execution of the conveyance made pursuant to the articles, Share expressed dissatisfaction because the releases had not been obtained, on which Anderson again told him not to be uneasy, for he should suffer no loss on that account, and Share being satisfied, the conveyance was then executed.

This was all the evidence of the promise relied on. In Pennsylvania, we have unquestionably gone further in admitting the declarations of parties, made at the execution of a conveyance, than the decisions of any chancellor would warrant; but this departure from the chancery rules of evidence has been regretted by some of the soundest lawyers in the state, and every day's experience proves its want of policy.

In giving effect, therefore, to parol evidence of the intention of the parties to a written contract, I shall never consent to go a jot beyond the adjudged cases, and, in truth, I would much rather recede than advance. Here, however, we have a very different case, for the attempt is not to control the written agreement, but to set up a parol promise independent of it, as the subject of a substantive and distinct remedy. Now there is no wiser rule, and certainly none better established, than that a contract shall not rest partly in writing and partly in parol. But further, the execution of the deed being the solemn and deliberative creation of the evidence of the contract, is the consummation of all preparatory negotiations and stipulations, even that although there may be collateral covenants, not executed by delivery and acceptance of a deed, the law raises a presumption to the contrary, which can be rebutted only by a manifest inconsistency between the provisions of the deed and those of the articles. But here the deed contained a covenant of warranty against the very incumbrances that were the subject of the promises, and it would therefore be impossible, even if there could be such a thing as a collateral parol promise, to say that it was not merged in the deed; for if it were not, the purchaser might proceed at the same time on the promise and on the covenant, and to say that he would be bound to elect his remedy, or that he could recover only one satisfaction, admits the identity of the subject-matter of the written and of the parol contract, and in that view is an argument in favor of the latter having merged in the former. The jury, therefore, were rightly directed, that unless the acceptance of the conveyance were procured by deceit, the declaration of the vendor ought to have no operation.

Under this head, also, may be ranked two bills of exceptions to the opinion of the court, rejecting evidence of the solvency of persons to whom Share had sold certain portions of the land; and that they had defeated him by setting up these liens as a defense to suits brought for the purchase-money. The evidence was offered to show the nature and extent of the

special damage suffered from the breach of the promise; and its competency therefore depended on whether the promise itself created any distinct responsibility that could have an effect on the event of the cause. I am of the opinion it was properly excluded.

Then as to the third head. The effect of incumbrances as showing failure of consideration or a defect in the title is certainly different in Pennsylvania from what it is in England, where an eviction at law is an indispensable ingredient of a claim for relief against payment of the purchase-money.

Here it is sufficient that eviction may take place. How far then had the incumbrances in the present case been actually discharged, and were there any still outstanding, which the court did not direct the jury to allow?

The compensation decreed by the orphan's court, in lieu of the interest which the step-mother and the twelve brothers and sisters of the vendor originally had in the estate, and which was divested by the decree confirming the estate in him, was a lien on the land; but all their respective shares had incontestably been discharged, except the share of one of the sisters, which, under the direction of the court, was allowed in the verdict, and also the share of another sister only half of which was allowed.

The last mentioned sister had died, leaving four children; two of whom had not released, and their part of their mother's share was consequently allowed; but the other two on coming of age had executed releases, the validity of which is denied, on the ground that the interest of the mother having been turned into personality by the decree of the orphan's court, could be released only by her personal representative, and not by her heirs, as these had no descendable interest in the money decreed to her. Such releases I admit are not valid at law, but they are undoubtedly valid in equity, and therefore good here, especially as the defendant sets up an equitable defense. If the money had been actually paid to the children to whom it was ultimately to go, would not chancery restrain an executor or administrator of the mother from prosecuting an action for it at law? Payment to the children would be good against every one but creditors, and here it does not appear that there were any; for we must intend the judge said the releases were good only under the circumstance of the case, and as the evidence has not been brought before us by a bill of exceptions, we cannot say this was error. But these incumbrances were

not, as seems to have been taken for granted at the trial, dependent for their effect on the covenant of warranty which was specially intended to protect against them; for this equitable defense rests not on the breach of a covenant, but on failure of consideration, and might have been equally urged if the conveyance had contained no warranty at all. There is, however, another incumbrance on which the warranty has a direct operation. The land lies within the manor of Springetsbury, and is subject to a quit-rent to the heirs of the late proprietors; and of these facts I will intend that the vendee was fully apprised as the nature of the title must have led him to a knowledge of the first, and the reservation of quit-rents in the proprietary manors, being not only a matter of public notoriety, but also recognized in the acts which divested the Penn family in their other lands, is to be considered a notice of the second. Under these circumstances it might admit of a doubt, whether a purchaser, even without a covenant against the quit-rent, could retain any part of the purchase-money. Where, however, there is notice of an incumbrance which is contingent, and the vendor covenants generally against incumbrances, the vendee will be considered as having chosen his remedy, and will not be permitted to retain: *Vane v. Lord Barnard*, Gibb. Eq. 6.

Here, if there had been no covenant, and the vendor had been ignorant of the existence of a quit-rent, the jury might have deducted its estimated value from the amount of their verdict; but the very circumstance of exacting a covenant against a known incumbrance which the vendee may extinguish, is inconsistent with an intention that more should be retained than what actually affected the land by being then due. It was contended that the whole value of the quit-rent should have been estimated and deducted, but the court directed the jury to allow only arrearages due at the time of the contract; and these as being a present charge, were properly a subject of defense, on the same ground that the liens created by the proceedings in the orphans' court were allowed; but the vendee could not retain to meet charges accruing afterwards.

Lastly, as to the defect in the title. The acknowledgment of the conveyance in Lancaster county, although before a justice of the peace in York county, in which the lands lie, was undoubtedly void. The taking of the separate examination of a *feme covert* is a judicial act, and, therefore, as local in its nature as any other within the compass of a justice's official duty, who can do no act nor exercise any judicial function out of his proper

district or county. If jurisdiction were given to justices of the peace for considerations that relate only to their office or persons, it is not easy to discover anything like a reason, for the legislature having attached any local qualification to it; for the magistrates of one county possess, in contemplation of law, as competent a share of talents and integrity as those of another, and, therefore, this official trust might as to that, have been as well confided indiscriminately to all justices in the state, as to those of the county where the lands lie. But although the dower of the vendor's widow was not barred by the acknowledgment of the conveyance, yet she prosecutes this suit in direct opposition to her right, and has, therefore, precluded herself from urging it hereafter. A party in her situation will never be permitted to affirm an act in part, and disaffirm it in part; but shall be put to his election to confirm it altogether, or abandon it altogether.

This principle, which is universal, and said to prevail in the laws of every country, is applicable to all interests, whether of *femes covert* or infants, whether immediate, remote or contingent; of value or of no value; and as well to deeds as to wills.

It is this principle—that none shall claim in repugnant rights, and that he who would take the benefit shall not dispute the title—which prevents a tenant from setting up title against his landlord.

Whether the widow had a beneficial interest under the will is immaterial, her having joined in a suit to recover the price of a title, which was sold as a good one, was a determination of her election, which shall forever estop her from disputing the validity of the title, to which, after every legal disability was removed, she has thus become a party.

The error in the charge respecting the acknowledgment of the deed, therefore, was one that did not prejudice the defendants, as the vendor's widow, who is an executrix of his will, and one of the plaintiffs in the suit, ratified the sale and cured the defect in the title.

The judgment is affirmed.

TILGHMAN, C. J., took no part in the opinion, having been absent during the argument.

Judgment affirmed.

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In *Loback's case*, 6 Watts, 177, the point determined as to a legacy being a lien on the land was shown to be otherwise determined in *Hellmon v. Hellmon*, 4 Rawls, 140. As to fraud entitling one to recover back the purchase-money, this case is cited in *Foster v. Gillman*, 13 Pa. St. 343.

In late cases the court rely on the principal case showing when a party is estopped to deny the validity of an instrument under which he receives and claims a benefit: *Smith v. Warden*, 19 Pa. St. 424; *Fryer v. Rishell*, 84 Id. 521. In this last case a married woman having received a full consideration for her assignment, and by her own act disabled herself from restoring such consideration, was held estopped from repudiating the assignment on the ground that she had not acknowledged the same.

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## KAUFFELT v. BOWER.

[7 SEBASTIAN & RAWLE, 64.]

**VENDOR'S LIEN UPON REALTY.**—Where an absolute conveyance is made of land, a receipt given for the purchase-money and possession delivered to the vendee, part of the purchase-money being paid and the bond of the purchaser, with a surety taken for the residue, the vendor has not a lien for the residue against judgment-creditors of the vendee whose judgments are subsequent to the conveyance, although they may have had notice that a portion of the purchase-money still remained unpaid.

**ERROR to the common pleas.** The action was instituted by Bower against Kauffelt, a sheriff, with notice to the judgment-creditors of Treichler. Bower had executed an absolute conveyance of a certain tract of land to Treichler, one half the consideration-money being paid at the time of the execution, and bonds given by Treichler, with one Smith as surety, for the payment of the residue in five annual installments. A receipt was at the same time made on the deed for the purchase-money, the title papers were given up and possession was delivered. The land was sold under an execution issued upon judgments obtained in favor of creditors of Treichler subsequent to the conveyance. The creditors knew that part of the purchase-money remained unpaid. The presiding judge charged the jury, after a review of the evidence, "the only question then is, did Jacob Bower's lien continue upon this land at the time it was sold by the sheriff. If it did, you will find for the plaintiff; if it did not, you will find for the defendant."

Verdict and judgment for the defendant.

By Court, GIBSON, J. The decision of the principal question, whether an equitable lien for purchase-money can exist in Pennsylvania under any circumstances, will render a decision of most of, if not all of, the other questions raised unnecessary. I have given this question that deliberate consideration which the great importance of its practical consequences deserves, and the result is a settled conviction that with us such a lien does not



exist. In England, the doctrine is now too firmly established to be questioned, and is said to be borrowed from the civil law. But whatever be its origin, it is certain that the first trace of it in the English law is discoverable in *Chapman v. Tanner*, 1 Vern. 267, which was decided as late as 1684, three years after the date of the charter to William Penn; and even there, as appears in *Fawcett v. Heelis*, Amb. 726, the decision was rested on a special agreement that the vendor should detain the title deeds, which therefore presented, not the case of an equitable lien, as now understood, but of an equitable mortgage.

When the colony was founded, then our ancestors could not have brought this doctrine along with them, for it was no part of the law of England, and no law even of positive enactment subsequently established there would extend here, unless the colony were expressly named, or the law were adopted in practice. But the whole course of our jurisprudence, with the exception of certain *dicta* thrown out in two cases decided by this court, which I shall presently examine, shows that the doctrine has never been recognized either by the legislature, or by the judiciary, or supposed to exist by the profession or the people. The legislature has uniformly discouraged every other lien or incumbrance than those which arise from transactions which appear of record, and which therefore can prejudice no one who uses proper diligence to ascertain the state of the facts; and even where liens are permitted, it has been thought that the state of property, as well as the habits of the people, required them to be laid under severe limitations and restrictions. Thus, by act of assembly, a judgment continues a lien for but five years, unless within that period it be revived by *scire facias*; and by the acts of 1715 and 1775 no mortgage could affect the land, unless it were recorded within six months from the date. This has, however, been altered in some respects by an act of the last session.

But the whole plainly shows it was thought the vendor had no other security than the mortgage; for it would be strange if a purchaser from the vendee should hold the land discharged of a mortgage given expressly to secure the purchase-money and yet hold subject to an equitable lien; and that this might happen if the doctrine prevailed is obvious; for the purchaser might often be affected with notice that the purchase-money had not been paid to the original vendor when he could not be affected with notice of the mortgage; and in such case, I think it clear, according to the English doctrine that the lien would hold, for

taking a mortgage for the whole purchase-money would not, I apprehend, be construed a waiver on the ground on which taking a mortgage for part gives rise to an inference that the vendee is to hold discharged of the residue; because by taking a mortgage for the whole, the parties expressly evince an intention that the land shall be charged with the whole. But however that might be, we cannot intend that latent incumbrances were designed to be tolerated, when we find even those which appear of record considered in some measure as clogs on the freedom of alienation so congenial to our habits, and find them so guarded by several acts of assembly as to require, under severe penalties, satisfaction to be entered wherever the money has been paid.

In other cases, the legislature has taken care to provide that the lien shall continue only a definite period, as in the case of liens on houses for materials furnished, which continue for but two years, unless an action be brought, or a claim filed in the prothonotary's office of the proper county within that time; and of debts of deceased persons, which remain a lien on their lands for only seven years after their death, unless they are secured by mortgage, judgment, recognizance, or other record. So the lien of judgments in the supreme court is restrained to lands in the county where the judgment is rendered; and in like manner, the lien of a *testatum* execution commences from the delivery of the writ to the sheriff, who is to indorse the precise time of receiving it, and whose duty it was before the circuit courts were abolished, to certify the same to the circuit court of the proper county. All this shows that the doctrine of lien has never been encouraged by the legislature, but has been barely tolerated, and that, too, only in particular cases and under severe restrictions.

In the practice of our courts, we look in vain for a recognition of the doctrine, except as far as it may be thought to be discoverable in the two decisions to which I have already alluded. But in neither of them did the case present a single feature of equitable lien, which arises only when the legal title has been conveyed. Indeed, on a bill by the vendor for a specific performance of the articles, he is said to have a lien, so as to protect him from the claims of the other specialty creditors; but this lien becomes operative only after he has conveyed, as in *Charles v. Andrews*, 9 Mod. 157. But the name of the lien denotes its nature. It is a bare equity, and the only interest the vendor is supposed to have retained; for while he has the legal

title, which will prevail against all the world, before the vendee has paid the purchase-money, or done whatever else may be requisite to enable him to call for a conveyance, he stands in need of nothing more. He has what is better than an equitable lien; he has the title itself.

Now I can hardly believe that the case of *Stouffer v. Coleman*, 1 Yeates, 393, the first of the two in order of time is accurately reported, for so learned and able a judge as Chief Justice McKean, after determining that the legal title had not been conveyed, would not have embarrassed himself with questions on which the cause did not turn. Lien was out of the question, as the vendor was not addressing himself to the equitable powers of the court, for a specific execution of the contract, but had brought an ejectment on the legal title to rescind it. So if the vendee had sold to a stranger without notice, such stranger would, contrary to what the court are made to say, have been in no better situation than the vendee himself, for there is no plainer principle than that the purchaser of an imperfect title, and every equitable title is imperfect, must abide by the case of the person from whom he buys: *Whitfield v. Faussat*, 1 Ves. 887. He is, therefore, bound to take notice at his peril. Neither could the detention of the title deeds add to the plaintiff's case, when the title itself was not conveyed. The reason why the detention of the muniments give an equity in England, where deeds are not generally registered, and where possession of the title papers is a badge of ownership, is that the want of them is notice to the purchaser from the vendee, that the latter had not cleared scores with the vendor, and, therefore, the title though complete at law is to be considered as incomplete in equity, but that circumstance surely cannot strengthen the case when the title is incomplete even at law. It would seem in this case of *Stouffer v. Coleman*, the plaintiff's case was considered to be a compound of legal title, equitable lien, and equitable mortgage, and that it was sustained on no distinct principle either of law or of equity. The defendant and not the plaintiff, as said in the report was claiming equity, and the manner in which it was accorded to him for his improvements, partly by compromise and partly by arbitration, shows the miserable shifts to which we are sometimes driven by the want of a court of chancery.

The other case to which I have alluded is *Irvine v. Campbell*, 6 Binn. 118, and there the court undoubtedly made use of an expression favorable to the doctrine, but that was not the matter decided, for there, also, the vendee purchased only an

equitable title. The instrument under which the plaintiff claimed, being in the form of articles of agreement and containing a covenant for further assurance, was of course executory. With great respect for the judges by whom the cause was decided, I apprehend the question of notice was immaterial, for a purchaser of anything less than the legal title, takes it as I have already said with all its imperfections on its head, and in all these circumstances the case differed from the ordinary case of an equitable lien of which being a mere equity reserved by the vendor, a purchaser of the legal title from the vendee will take the land discharged, unless he can be affected with notice. The decision on the point of the case was undoubtedly a sound one, but however much we may respect what falls from a court in illustrating an argument, it can claim nothing like what is due to the decision of the precise point in controversy. These two cases contain every thing on the subject that is to be found in our books of reports, and this judicial silence is a strong argument against the lien, which would necessarily have given rise to much litigation if it had been considered to prevail among us.

Then as to the sentiments of the profession; I have never till lately heard a doubt on the subject. In fact, the doctrine accorded with neither the professional nor the popular understanding; nor can I conceive how it ever came to be considered a principle of general equity anywhere, that a vendor who has divested himself of every particle of right that can pass by deed, shall nevertheless have an available interest in the land. The implication that there is an intention to reserve a lien for the purchase-money, in all cases where the parties do not, by express acts, exince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass. The construction, therefore, which independently of fraud or mistake, reserves an interest, against the express language of the parties, is unnatural and unjust. Indeed, the distinctions taken, both as to the creation of the lien, and those circumstances which are held to be a waiver of it, are so purely arbitrary that the mind is often puzzled to find the reason of them. Thus the assumption that taking an independent security is inconsistent with an intention to retain the lien, is merely gratuitous; for the parties might in all reason just as well be supposed to have intended the security to be cumulative.

It is inconsistent with natural justice that a vendor who

publishes to the world, by the terms of his deed, that he has parted with his whole interest, and has trusted to the personal security of the vendee, should become an object of special protection against the consequences of his own negligence, and that, too, at the expense of a third person, who in purchasing from the vendee, even with notice that the purchase-money was unpaid, has been guilty of nothing positively immoral or even unconscionable. In practice it is never understood with us that a lien is reserved; for it is so entirely technical that none but a lawyer would suspect that it existed. Tell any man who does not belong to the profession, no matter how intelligent he may be in other respects, that if he conveys his house or farm without taking a judgment or mortgage, he may nevertheless come on it as a fund in the hands of a subsequent purchaser, and he will disbelieve you. In this country, where every man is his own conveyancer, or at least where those who draw instruments are seldom of the profession, a construction contrary to the popular notions would in a peculiar degree defeat the actual intention of the parties, and so far work injustice. It is surely as important that the habits and understanding of a whole people should have an influence on the construction of their contracts as those of a particular class, and we all know the influence of the course of trade in determining the meaning of the parties to a mercantile contract.

But if such a lien were adopted, it is impossible to see how it could be enforced through the medium of common-law forms with convenience or justice to any or all of the parties. "It is," says Story, J., speaking of the equitable lien, "so peculiarly and exclusively the creature of a court of equity, that its existence cannot safely be averred independent of the decree of such a court:" 1 Mason, 122. A moment's consideration will show the justness of this remark. A court constituted as are those of this state, and of Massachusetts, where this kind of incumbrance does not prevail (and probably for that very reason), is destitute of the most essential and indispensable means of doing complete justice, such as the bill for a discovery as to knowledge of circumstances; the answer on oath; power to bring every person interested into court as a party; and particularly that wonderfully plastic and efficient instrument, the decree of a court of chancery, which, adapting itself to the peculiar circumstances of each case, however complicated, equally reaches and protects the most remote and the most immediate interests, and at one operation does complete justice to all.

With us all these are wanting, and in their stead we have power to deliver the land itself to the vendor by an action of ejectment, or possibly to levy an execution on it in the hands of a purchaser from the vendee; but how inadequate to the end either of these would be must at once be obvious.

A sale on credit for at least a part of the purchase-money is, in this country, the usual mode of disposing of land; and I understand that during the late rage for speculation, a plantation in Lancaster county was sold six times in one day, and at each of these sales there would, according to the English doctrine, have been an equitable lien. But it would be impossible in such a case for a court in this state to settle the equities of the respective parties. Suppose a recovery by the first vendor against the last vendee, would the intervening vendors be squeezed out, or could they, by paying the claim of the first, avail themselves of his right? But the rights of the vendor are in this respect peculiar to his person, and cannot be extended to third persons, at least as far as respects marshaling real and personal estate; and they would, therefore, probably have to bring actions in succession, as each should happen to obtain satisfaction. In like manner, if the estate were sold on an execution, there would have to be separate issues to try the right of each claimant to the money levied. And for what purpose involve the administration of the law in such inextricable embarrassment? Not to enforce a demand founded on natural equity, but on an artificial presumption of intention contrary in almost every instance to truth, that the vendee is to be a trustee of the estate for so much of the purchase-money as is not paid. It appears to me, then, that the equitable lien for the purchase-money, if such a lien can, with propriety, be called equitable, has never been recognized here either by the legislative or judicial construction, the practice of the profession, or the mass of the citizens; and that as it is highly inconvenient, and by no means essential to the interests of justice, we ought not to adopt it.

There were also questions made below as to the competency of evidence, but the facts and circumstances are so imperfectly stated in the bills of exceptions, that the questions do not appear perfectly intelligible, and I therefore refrain from expressing any opinion on them; but on the first ground I am of opinion that the judgment be reversed.

DUNCAN, J. This was an action to try the right to money arising from a sale made by the sheriff of York county, of a

tract of land, conveyed by Jacob Bower to Daniel Treichler, and sold as his estate. The defendant in error claimed it on the ground of lien for the unsatisfied purchase-money, for which he had taken the bonds of Treichler and one John Smith; there is a receipt on the deed for the purchase-money and possession was delivered.

This case gives rise to inquiries of very extensive consequences. 1. Does the British law of liens for unsatisfied purchase-money, where conveyance is executed, receipt given, title papers given up, possession delivered, extend to this state? 2. Does the acceptance of a bond with security amount to a waiver of this lien? 3. Can such latent equity prevail against a judgment creditor? and, 4. On a sale of lands made by a sheriff, deed acknowledged, money in his hands, is he bound to apply the proceeds to the discharge of unsatisfied purchase-money or to the payment of the judgment creditors?

It is proper *in limine*, to observe that in deciding this case, it can make no difference whether the issue is directed by the court, or it is an adverse suit by the vendor against the sheriff. The sale by this application by the vendor is validated by him. The purchaser at sheriff's sale is not before the court, nor in the way in which the subject has been considered has he any interest in the event. The determination of any of these questions against the defendant in error, would be decisive; but it is made the duty of this court to give their opinion on every point taken in the court below.

I will, in considering these points, reverse their order, and begin with the fourth. What estate is seized and sold? The estate only which the debtor had, "the purchaser to hold only such estate as the debtor held at and before the taking in execution." Here there is a purchaser without notice, and the lien as to him is extinct. If there were any specific lien on record created by deed or will, binding the land, it might be that the sheriff would be bound to pay them; there is a *nisi prius* decision to this effect: *Nichols v. Postlethwaite*, 2 Dall. 131, but I do not go out of the way to give any opinion on that. But that where one has conveyed away his estate, giving a receipt for the purchase-money, delivered possession; where a creditor relying on the estate as a fund, has afforded a credit, after long and expensive course of legal proceedings, that such creditor should be intercepted and deprived of the fruits of his execution by this latent equity, is an alarming and novel doctrine.

Let us attend to the consequences. In the course of twenty

years, the estate may have passed through every letter of the alphabet, the intermediate owners dispersed in every quarter of the almost boundless regions of the United States, their place of abode unknown, or if known beyond the reach of reasonable inquiry, every hand through which it passed might claim some remnant of purchase-money. What a scene of confusion would ensue, how are all their claims to be adjusted, the parties brought before the court. Is there to be one issue or twenty-four? The creditor has already sufficient difficulties to encounter, add this to them and you destroy all credit; consider what a temptation is opened for fraud between the vendor and the insolvent debtor, who by connivance, might keep back the vouchers of payment and afterwards divide the spoil, the latent incumbrance kept in *petto* until the man possessing every *indicia* of property, conveyance with acquittance and receipt of purchase-money with muniments of title, with possession on the faith of this ownership, obtains a credit and just as his creditor is about to receive his just debt the covert incumbrance springs upon him and swallows up all in unsatisfied purchase-money. If this had been a private sale, could the vendor sue the purchaser? What would be his form of action? If he has any right in this state, his remedy must be by ejectment, the substitute for a bill in chancery, which has been from necessity applied to all cases where one has a lien on lands, for the recovery of which there lies no action at common law but in chancery only. Our courts wanting chancery powers, through the medium of a jury and conditional verdicts, and imposition of equitable terms, nearly accomplish indirectly what courts of equity would directly decree.

A deposit of deeds, with a written agreement to execute a mortgage, the depositor is in debt to others, he gives a judgment on which the lands are sold; money in sheriff's hands, deed acknowledged to purchaser; can the man who holds this pledge draw the money from the sheriff? One would be startled at this proposition, yet he has a preferable equity, and overreaches the vendor's lien, on the estate for any part of the unpaid purchase-money: Sugden, 475. Is this lien a reprisal on an inquiry "whether the rents, issues and profits will pay the debts within seven years?" Make the most of this lien. Say that a deed executed holds the same lien as articles executory. If lands held by articles, are sold by the sheriff, the purchaser takes them subject to the payment of the purchase-money, out of the money raised on the sale. This is not de-



ducted; the creditor gets the money from the sheriff and not the vendor; his remedy is by ejectment: *Irvine v. Campbell*, 6 Binn. 118. On a judicial sale under a decree in chancery where all necessary parties joined in the conveyance, possession is delivered, money paid into bank but not to be paid over without notice to the purchaser; the tenants were served with a writ of right or an adverse claim before money paid out of bank, the money must be paid under the decree and the purchaser cannot object to its application: Sugden, 415.

But the question is settled as to a purchaser at sheriff's sale, under the act for recording deeds. He is a purchaser, though a judgment creditor is not, and is protected against an unrecorded deed: 2 Binn. 40 [*Heister v. Fortner*, 4 Am. Dec. 417.] It is of some weight, that though this kind of claim must have existed in hundreds of cases, this is the first time it has been advanced. This plainly shows the general sense. This action cannot be maintained against the sheriff.

Does the equitable lien prevail against judgment creditors? By several acts of assembly, as well as by the common law, a judgment is a lien binding lands. It continues a lien on real estate, without execution levied, for five years. A judgment here, in many respects, differs from a judgment in England, as to its binding effects, and the interest acquired by the creditor, and his power to compel payment by a sale. There is nothing here to distinguish it from a mortgage, except that the mortgage is specific and the judgment general. In England a judgment-creditor is said to have neither *jus in re* nor *ad rem*; he has a lien, but *non constat*, whether he will ever make use of it, for he may recover his debt by *fiery facias* from the goods of the cognisor; he may take the body on a *capias satisfaciendum*, and thus discharge the lien. It is considered in that country that the judgment-creditor does not lend his money on the immediate view of the cognisor's real estate, 1 P. Wms. 280, 492, but that does not hold here. For in *Calhoun v. Snider*, 6 Binn. 135, Judge Yeates, the strenuous and finally successful advocate of the doctrine that judgments do not bind after purchased lands, relies much on the binding specifically all lands held by the cognisor at the time of the entry, and that creditors do rely on the real estate always as a fund, and often as the sole fund. It is very common to take a judgment bond as a security, with stay of execution for years. This would be a miserable dependence, if the security was not equal to a mortgage in all cases, except in the one of an unsurveyed deed. That depends on the

different provisions of the several acts for recording deeds and mortgages; there is a wide distinction in the effect of not recording mortgages and defeasible deeds, and absolute conveyances.

The act of 1715 establishing the office for recording deeds, declares that the first class shall not be sufficient to pass any estate of freehold or inheritance unless recorded within six months; in the second, the recording is only for the safe custody and rendering an exemplification as good and effectual evidence as the original deed. The act of 1775 renders the conveyance not recorded within six months void only as against a subsequent purchaser or mortgagor, leaving it in full force as to all other purposes. In *Jackson v. Dubois*, 4 John. 216, it was decided that a mortgage not recorded has a preference over a subsequent judgment docketed for the unrecorded mortgage before the act stood upon the footing of any other lien, and the act only provided that no mortgage unless duly recorded shall defeat or prejudice the interest of any *bona fide* purchaser or mortgagee, but it is not so here, for no estate passed under the act of 1715; consequently the mortgage gave no lien unless recorded within the limited time, and in the New York case it was held that land sold on a judgment by sheriff prior to the registry of the mortgage, the purchaser would hold discharged of the mortgage, and the decision in 2 Binn. 40 [*Heister v. Fortner*, 4 Am. Dec. 417], does not touch the question of unrecorded mortgages, but refers only to absolute conveyances.

We are not left to conjecture on this subject, for the act of twenty-third September, 1783, amounts to a legislative declaration; it provides "that all mortgages executed between the first of June, 1776, and the eleventh of June, 1878, which have been recorded or shall be recorded within six months after the passage of the act, shall be as good and effectual in law as if they had been recorded within the limited time, with this exception, that they shall not operate against any judgment or lien whatever." The whole policy of our law evinces the intention of the legislature that the notice by the registry should be given of all liens. But by a late act mortgages take effect only from the registry, except in the case of a mortgage given for the purchase-money of land, and the time allowed for registering is abridged; it would be absurd that the security by mortgage should become extinct if not recorded within six months, and yet the bond should continue the lien for an indefinite time. My opinion is that a lien by judgment is a legal incumbrance, to be preferred to an implied lien by purchase-money.

Does the taking of bond with security waive the implied lien? It has justly been observed that the taking of a bond with security has become so perplexed a question as to require a chancery suit to ascertain whether it is waived or not. In New York, in *Garson v. Green*, 1 Johns. Ch. 308, it was held that taking a negotiable instrument from vendee did not exempt from the lien. In Virginia, while they seem to adopt the English rule of lien, yet the courts have settled the question. Where a bond with security has been taken, the lien is thereby waived: *Cole v. Scott*, 2 Wash. 141; *Wilson v. Graham*, 5 Munf. 297. All the cases, and there are many, with shades of difference scarcely perceptible, and impossible to be reconciled, are fully considered by Mr. Justice Story, in *Gilman v. Brown*, 1 Mason, 212, who decides that where there is the security of a third person taken as such, this extinguished the implied lien; and on appeal, the supreme court determined that a collateral security for the purchase-money discharged the implied lien: 4 Wheat. 256.

The lien is founded on a presumed intention. Here there was evidence of a contrary intention from the nature of the speculation. Bower well knew that Treichler bought with a view to lay out a town on the land, to divide it, and sell in small lots; he knew before he executed the conveyance that others were concerned in the purchase, yet the deed is made to him alone, and when he insisted on Cassel being added as a security, while he made the deed to Treichler alone, the ostensible man to whom the title was to be trusted, and accepted the bond of Treichler and Smith, this arrangement shows that the land was not to be charged; it is manifest lien was not in the view of any party. When we turn our eye to that day of infatuation, consider the extravagant price, the rage for laying out towns, the declared design of the purchaser, which was not to keep the land, but to sell, to sell quickly, before the bubble burst; to sell certainly long before the last installment became due; it is obvious that it was not the intention of the parties to clog it with an incumbrance which would defeat the whole scheme. In *Brown v. Gilman*, Story, J., observes it was in the contemplation of the parties, bought on speculation to be sold out to sub-purchasers, the great object of speculation would be embarrassed by any latent incumbrance, which by a subdivision of the property might be apportioned among an almost infinite number of purchasers. It was not supposable that so obvious a consideration was not within the views of the parties, and view-

ing it, it was difficult to believe they should mean to create a lien. The same course was adopted on the appeal; taking the security of a third person, it was decided, repelled the lien standing on that fact alone. Considering all the circumstances of the case, the large payment in hand, the grand object of the purchase, the taking Smith in the bond, the subsequent addition of Cassel's name, the anxiety of Bower to procure that name, that Treichler was not able to make up his half of the hand-money, and Bower took his own bond for that balance, the presumed intention to retain a lien is removed; the lien is not in its nature conclusive, but *prima facie* evidence of an intention which vanishes when the real state of the facts is disclosed.

The court, in their charge, have gone the full extent of the British decisions, and have considered that as settled, which even there remains most obscure and unsettled. They state in terms, that taking an obligor in addition to the purchaser, was not such an alteration as would of itself defeat the lien. There was error in this, for *ipso facto* the taking a bond with security waived the implied lien.

I have reserved for the last inquiry the primary question to the decision, of which many are looking with anxiety and deep interest, for on its decision rest numerous claims to a vast amount, as we are informed, and as I well know to be the case. Does the rule of implied lien extend to this state? If it had been adopted by a settled course of decisions, and the public had acted upon it and placed reliance on it as a security, and men when they bought had been apprised of its existence, and those who credited them on the strength of their title had been put on their guard, it would, by the course of dealing and general adoption, become a settled rule of property; and whatever opinion I might entertain of its inconvenience I would not disturb it or unsettle it. But far different is it, for the doctrine is here a novel one lately broached in this state, and I may add lately imported, and directly against the understanding of the country and the opinion of professional men, and in direct opposition to the policy of our government, which is to leave this species of property altogether free to alienation, unincumbered with secret trusts or concealed liens. What is the rule contended for? It is that where an absolute conveyance, with receipt for the purchase-money is given and possession delivered, where the purchase-money is not paid, but bonds given for payment, the vendor has a lien in equity for the purchase-money against the vendee and his heirs, and against all

claiming under them, with notice that it remains unpaid, though there is no agreement for that purpose.

The first notice we have of this supposed lien is in *Stouffer v. Coleman*, 1 Yeates, 393. It is a *nisi prius* decision and but of one judge, yet it was acquiesced in and was the opinion of a very eminent judge, the late Chief Justice McKean. There a writing had been executed conveying by words of actual grant, but it was called an article of agreement, and looked to a future conveyance of the land, for there was a covenant to convey at a distant day by a good and sufficient conveyance. The chief justice considered the case as turning on a short question, "Did Stouffer sell and convey or only agree to sell and convey?" But even considering it an agreement a difficulty still rested with him, whether the bond taken for the purchase-money did not destroy the lien. To obviate this he had recourse to the circumstance, that no receipt was indorsed for the purchase-money, and Stouffer kept possession of the title papers. No doubt the lien existed because the legal title remained in Stouffer; but had it been a conveyance executed no question at that day would have been raised, no doubt entertained but the lien was gone. It was construed an agreement executory, where the vendor retained the legal title, and consequently held the lien: *Fawell v. Heelis*, Amb. 724, December, 1773, the latest decision before the revolution was recognized as the law of the state.

One sells an estate and takes bond for the purchase-money, the vendor has no lien against the creditors for whose benefit the estate had been assigned. Lord Apsley, in concluding his opinion says: "If the vendor parts with his estate and takes a security for the consideration-money, that is no reason for a court of equity to assist him against the creditors of the purchaser." This was the principle of the British court of chancery at the time of the revolution. New principles may have since been adopted there but here they have not been recognized nor are they applicable to the state of property or condition of this country: *Irvine v. Campbell*, 6 Binn. 118. This case has been misunderstood. There, as in *Stouffer's case*, the instrument was denominated an article of agreement, and contained a covenant that each party would give to the other, any further instrument of writing agreeable to law, which should be necessary for the security of either. So far from that being an acknowledgment of payment of the purchase-money, it appeared on the face of the agreement that it was not due, until

after the judgment and sale to Irvine. The vendee if required, was to give security for it. It was then very properly held, that a vendor had a lien for his purchase-money; the lien was apparent on the very instrument, and there was a covenant for payment, running with the land. It was a stronger case of lien than Stouffer's; there was no bond, other security was contemplated and it is to be observed in that case, that recourse was not had to the sheriff for the proceeds of sale but to the land by ejectment.

And in *Colhoun v. Snider*, 6 Binn. 167, Yeates, J., states that if the rule should be adopted here, that judgments bound after purchased lands, the situation of a buyer and seller would be most perilous. The seller would not be secure by taking a mortgage or judgment. The estate must necessarily be in the buyer before he could give a mortgage or a judgment, which might become a lien on the property; for *eo instanti* the conveyance is delivered, the old judgment attaches. The idea of lien had not entered into the mind of that learned judge, who spoke from an experience of more than fifty years, on a subject with which he had been particularly conversant; and from the general sense of the community, and as the point is new with us, there is good reason and sound policy in adhering to the common understanding that the security of the party himself should extinguish the lien on lands as it does on personal chattels: 4 Wheat. 296. That the rule itself is not one of general but peculiar equity, we have the high authority of the chief justice of the United States; for he cautiously avoided giving an opinion, whether it extended to the state of Georgia; "We do not mean to decide that question," was his observation.

Our local circumstances in considering questions of this kind are always to be respected. They differ materially from old settled countries, whose lands being improved for ages, the price is not so subject to great fluctuation. It is different here, where lands are treated as a species of merchandise: *Calhoun v. Snider*, 6 Binn. 146. The rule of law is *caveat emptor*; but let the seller take care; it is easy for him to take a mortgage if he means to hold the land as security; and this is so well understood that the instances are few where this is intended that a mortgage is not taken; and where this is not done, *prima facie* the vendor waives all lien, relies on the obligation of the vendee, sometimes alone, at others with the addition of some person as his security. Where he parts with the title, he takes all risk of payment on himself.

In this state the obligation of Bower was not what in the French law is called a privileged obligation, for which he had a lien on the property sold, to be paid in preference to other creditors; but a common, unprivileged obligation, without lien, agreement or covenant binding the land running with it; the personal security of the obligor. Such likewise is the settled principle in South Carolina: *Ex parte Wragg*, 2 Desaus. 509. It was there decided that a vendor selling lands, and conveying them in fee, and taking a bond for the purchase-money, has no implied lien on the land so as to give him any preference over the creditors of the purchaser. This implied lien would impede the transfer of lands, and the settlement of the country; raise up a new and fruitful stock of litigation, whose branches would cover the land, and entangle the people in endless controversies. Besides, without vesting other chancery powers than our courts can legally assume, it would be impossible to accommodate the common law jurisdiction and form to the varieties of disputes which this contentious doctrine would introduce. Indeed, many of our positive laws changed as regards the payment of the debts of persons deceased, and the division of the estate of insolvent debtors among the creditors. For a bond for payment of purchase-money would come in for payment out of the land purchased and held by the deceased before the many other kinds of debts that precede it under our laws; and such bond might exhaust the most valuable parts of the estate of an insolvent debtor, and leave little for his other creditors. There is no natural equity in favor of the lien, it does not exist at law, it is not created by usage of the parties or express agreement.

But I except all cases of deceit and distinct fraud, where one having direct notice that the purchase-money has not been paid, for the purpose of defrauding the vendor, obtains a judgment, mortgage, or conveyance. I would hold this all fraudulent and void, and that vendor might proceed to judgment and sale of the land, for this transaction, though valid between the parties, as to others, by reason of covin, collusion, or confederacy, would be fraudulent and void. As if a man knowing that a creditor had obtained a judgment, buys the debtor's goods for a full price to enable him to defeat the creditors, it is fraudulent and void: *Worseley v. De Mattos*, 1 Burr. 474. So if a man knowing that an executor is wasting the goods of the testator and turning them into money, the more easily to run away with it, buys from the executors with that view, though for a full price, it is

fraudulent and void: *Mead v. Orrery*, 3 Atk. 235. For nothing can be better established than that the laws will set aside, however valuable the consideration may be, every contract which is fraudulently designed to prejudice, and does prejudice, others; but the knowledge by a purchaser that there was a balance of purchase-money remaining due when the vendor had conveyed the legal title, and taken bond for the purchase-money, is not of itself such notice as will taint the purchase with fraud, and render the land liable for the purchase-money.

On the exceptions to the evidence, as there was no lien, and as no action could be supported against the sheriff, it follows that all was irrelevant and inadmissible. For these reasons, I am of opinion that the judgment be reversed.

TILGHMAN, C. J., was not present at the argument, and gave no opinion.

Judgment reversed.

The doctrine here laid down has been repeatedly affirmed in Pennsylvania. In *Strauss' appeal*, 49 Pa. St. 358, Agnew, J., says: "The doctrine of equity that a lien exists for unpaid purchase-money, never was adopted here, but it had also been held, certainly always since *Kaufelt v. Bower*, that if a vendor made a lien and took no lien by judgment, mortgage, or express charge in the conveyance, no lien for the purchase-money existed." And in *Heister v. Green*, 48 Id. 102: "If notice of unpaid purchase-money be sufficient to create a lien, *Kaufelt v. Bower* ought to have been differently ruled, for the purchaser there had such notice, but the court refused for the most solid reasons to imply a lien." So also in *Megargree v. Saul*, 3 Whar. 20; *Bear v. Whisler*, 7 Watts, 144; *Zentmyer v. Mitterer*, 5 Pa. St. 412; *Wilhelm v. Folmer*, 6 Id. 299.

However, in this state unpaid purchase-money may be so charged on the land as to create a lien. "Such is our repugnance to implied or constructive liens that we refused to treat a recitation of unpaid purchase-money as a lien, though standing in the channel of the title; and we desire to be understood as having refused after great consideration of the subject [referring to *Heister v. Green*, *supra*]; but where it is expressly charged, the lien must be supported." Woodward, C. J., delivering the opinion of the court in *Heist v. Baker*, 49 Pa. St. 14. The same principle is recognised in *Strauss' appeal*, *supra*, and in *Neas' appeal*, 31 Id. 293.

## RAMBLER v. TRYON.

[7 SERGEANT & RAWLE, 90.]

OPINIONS OF WITNESSES AS EVIDENCE.—Where a will is impeached on the ground of imbecility of the testator from childhood to his death, the opinion of other witnesses than those attesting the will, who knew him, without stating facts, is not admissible; but when the opinion is based on facts stated, it may be received as evidence.



**TESTATOR'S DECLARATION.**—In such case, the declarations of the testator, made in the absence of his wife, the devisee, showing importunity on her part and his father-in-law to procure a will, are admissible.

**OPINION ON HYPOTHETICAL FACTS.**—Witnesses giving their opinion as to the capacity of a testator, founded on facts known to them, cannot in cross-examination be asked what their opinion would be on a different state of facts.

**RECOVERY IN EJECTMENT FOR MOIETY.**—After a plaintiff has obtained judgment in ejectment for a moiety of the land, he may sustain a new ejectment for the whole, against the same parties, without taking possession, or using any means to enforce the former judgment.

**EJECTMENT** by the plaintiffs below, heirs at law of Michael Rambler, deceased, against Eve Rambler, the widow of the said Michael, and H. Spayd, who held under her. The right of the defendants below turned on the validity of a paper purporting to be the last will and testament of Michael Rambler, the owner of the estate, by which he bequeathed it to the said Eve Rambler; and if such paper was invalid as a will, the plaintiffs were entitled to a verdict, as heirs at law. The execution was duly proved by the witnesses, who testified as to the testator's capacity, and his being of a sound and disposing mind at the time. The will was impeached on the ground of imbecility of mind of the supposed testator, from his childhood to the time of his death; and witnesses were offered to prove certain facts tending to show an extraordinary dullness of understanding, followed up by their opinions, founded on these facts, that he was incapable, from defect of understanding to make a will. This evidence was objected to, but it was admitted, whereupon a bill of exceptions was taken.

The evidence is reviewed in the opinion.

The names of the counsel do not appear.

By Court, DUNCAN, J. The right of the plaintiffs depended on the validity of a paper purporting to be the last will and testament of one Michael Rambler, the owner of the land for which this ejectment was brought. If this was not his last will and testament, the defendants in error and plaintiffs below were entitled to a verdict. The execution of the will was duly proved by the subscribing witnesses, who likewise attested the capacity of the testator, and that he was of sound and disposing mind and memory. The will was impeached on the ground of imbecility of mind of the supposed testator, from his childhood to the hour of death, and witnesses were offered to prove certain facts tending to show an extraordinary dullness of understand-

ing, followed up by the opinion of the witnesses, as founded on the facts, who had known Rambler intimately from his childhood to his death, that he was incapable, from defect of understanding, to make a will. All this evidence was objected to, and the objection overruled, and evidence admitted.

I am at a loss to perceive any plausible reason to support this objection. I know not how otherwise the alleged imbecility of mind could be proved than by the evidence of those who grew up with him, who marked his conduct in infancy, in the prime of life, and in his decline. The opinion of the witnesses, without stating the grounds of such opinion, ought not to be received. But when they state facts, indicative of want of common intellect, their opinion is always received. The weight it ought to have will depend on the solidity of the reasons assigned for the opinion, and the intelligence of the witness.

This is not a case of alleged lunacy. It is in the nature of idiocy. Not an obscuration of the mind at particular seasons, but a continued darkness of the understanding from birth until death, a perpetual infirmity from infancy, rendering him incapable of managing himself and his affairs. This is the allegation. I say nothing, nor is it my duty to give an opinion, whether the proof, when admitted, made out or did not make out the case of those claiming as heirs. To confine it to subscribing witnesses to the will in such a case as this would be absurd. It is not alleged that during a partial privation of understanding he signed the will, but that he never was at any time of his life capable of making his will, and in that case I can see no good reason for excluding all but the subscribing witnesses to the will. The friends who visit him, the physician who attends him, have equal if not superior means of information, to him who may be called on, after the will is declared in his presence, to attest its publication.

The will of every man would depend too much on the subscribing witnesses, if no other were deemed competent to testify to the sanity of the testator. The most spurious instrument would be imposed on the heir, or the devisee might be deprived of the estate devised, by a conspiracy of the subscribing witnesses. Such conspiracy is not without a precedent in law: *Lowe v. Jolliffe*, 1 W. Bl. 365. Five subscribing witnesses to a will and a codicil, and a dozen of servants of the testator, unanimously swore him to be incapable of making a will. To encounter this evidence, several of his friends, who had frequently conversed with him during a period of four years.

deposed to his entire sanity and more than ordinary intellectual vigor. The will was established, and the testamentary witnesses convicted of perjury. This evidence was properly received.

The declaration of the testator that his wife and father-in-law plagued him to go to Lebanon, that they wanted him to give her all, or he would have no rest; that he did not want to go to Lebanon; this would be evidence of weakness of mind, operated upon by excessive and undue opportunity. It forms no objection to it that these murmurs of a weak mind were made in the absence of the devisee.

We should be surprised to hear that they were made in the presence of that devisee, an importunate and teasing wife. There often will be influence used in procuring a will, but this can be no reason to set it aside; but undue importunity, plaguing a weak man, giving him no rest until he would give all, are circumstances to be considered by a jury, in connection with proof of imbecility of understanding, denoting a man so void of reason, as that he is incapable of managing or disposing of his estate.

As to the rejection of the deposition of John Snee, the court had established certain rules for filing depositions; these had not been complied with, and the deposition was properly rejected. In the cross-examination of the Rev. Dr. Lochman and Judge Gloninger, who drew the will, and who were examined in chief by the plaintiffs in error, who spoke of the knowledge of Michael Rambler, and testified to his capacity; a string of very extraordinary questions were put to them, which were objected to, the objection overruled, and exception taken. These witnesses had given an opinion of the capacity of this man, founded on facts known to them, and conduct within their own observation. And they are called on to say what their opinion would be in a different state of affairs. These questions were ensnaring, and to which the witnesses themselves might justly have excepted; they drew their opinions from their own knowledge and observation, not from the knowledge and observation of others. They gave the opinion and the reasons for the opinion on oath. They were not bound to give an opinion on an assumed statement of facts, or facts sworn to by other witnesses; but this evidence the plaintiffs in error were right in objecting to, although the witnesses might be willing to answer the questions. Opinion is no evidence, without assigning the reason of such opinion. Now, the wit-

nesses had already given the opinion, and the facts on which they founded it; the jury were to judge of the correctness of that opinion from the facts and reasons stated by the witnesses. But the witnesses' opinion of the capacity of a man must not be founded on the hearsay of others, or the oath of others. As well might the defendants in error have called for the opinion of any bystander who had heard the evidence given by them of the state of the man's mind, and asked him what he thought of the capacity of Michael Rambler.

With the same propriety they might have called in every man in Lebanon, and inquired of him what think you of Michael Rambler's capacity to make a will after the proof we have here given? So the devisees might have inquired of every man they could see in court: we have proved certain facts, do you not think our testator had sense enough to make a will? To give such latitude as was allowed in this case, to a cross-examination, would be trying a cause, not by the evidence of facts and opinions formed by witnesses from their own observation and knowledge, but would be trying it on opinions founded on hypothesis and facts stated by others, unknown to the witnesses, and altogether inconsistent with their knowledge, and with the knowledge to which they had testified. Ask the opinion of a witness, as was here done—if you knew Michael Rambler neither knew the value of money or property, would you think that he was capable of making a will? The answer would be, I think not. Ask him again, if you knew Michael Rambler had sense enough and was selected to be an elder in the church, and had as much sense as half the farmers in the country, would you think him capable of making a will? The answer would be, I think he would. Does such question and answer deserve the name of evidence? Does it demonstrate the matter in issue—the capacity of Michael Rambler? I think it does not; it might perplex—but never would enlighten the jury.

I am therefore of the opinion there was error in this. It requires not the understanding of a Locke or a Newton to make a will; there is no standard by which the understanding is to be weighed, but one—and that is—has the party such a portion of understanding as would enable him to do any binding act?

The last exception is to the charge of the court. The court decided, that after the plaintiff has obtained a judgment in ejectment, he can sustain a new ejectment against the same parties for the same land, without having gone into possession, or suing out a writ of possession, or using any means whatever to enforce the first judgment. If the action of ejectment were

for the recovery of damages for the entry and continuance of possession, it would seem to me that this decision would be erroneous, and that the party might avail himself of it at a proper stage of the cause. For a recovery in trespass without execution is a bar; but the damages are in ejectment nominal, and I do not know that in action for *mesne* profits, there would be a recovery beyond the time of judgment. If it was trespass the former recovery must have been pleaded; but in ejectment, on the general issue, perhaps everything might be given in evidence to bar the plaintiff's recovery. This would present a difficulty, and where the first recovery was for the whole land for which the second ejectment was brought, the defendant who was willing to surrender the land, might be unnecessarily exposed to the costs of a new ejectment.

In such case I think the court could grant relief in a summary manner on motion, for they possess the power to alter the practice and institute any new rule in an action of ejectment which they may deem beneficial, not inconsistent with legislative provisions: 4 Dall. 144. Courts have exercised a similar power, for when an ejectment had been brought and was depending in the court of common pleas, and another brought in the king's bench, the latter was stayed till the former was discontinued and decided: Andr. 297; and if a party would harass a defendant by double ejectment, the defendant would be relieved on motion.

When such a case occurs, the court would exercise their own discretion in granting relief on motion, but it does not occur here; for here the plaintiffs only recovered a moiety, and if the defendants did not intend to contest his right to the moiety, they might have so entered their defense; for by the act of twenty-first March, 1806, regulating proceedings in ejectment, it is provided that the defendant shall enter his defense for the whole or any part, and thereupon issue shall be joined. They have taken defense for the whole, issue was joined on the whole, and they come too late on the trial of this issue to say we admit your right to the possession of the part recovered. This, from the nature of the claim, they never intended to do. They claimed the whole under the will, and the issue in substance was on the validity of the will. There was therefore no error in the charge in this respect.

Judgment reversed.

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In *Pidcock v. Potter*, 68 Pa. St. 342; S. C., 8 Am. Rep. 181, the authority of this case was affirmed. Here it is decided that after a non-professional

witness has stated the facts upon which his opinion is founded, he may be permitted to state his opinion as to the sanity or insanity of a testator. The court say: "In Pennsylvania it has always been the rule that after a non-professional witness has stated the facts upon which his opinion is founded, he is permitted to state his opinion as to the sanity or insanity of the testator:" 1 Redfield on Wills, 141. From *Rambler v. Tryon*, decided by Judge Duncan in 1821, and *Wogan v. Swall*, 11 Serg. & R. 141, decided by Chief Justice Tilghman in 1824, to *Tilow v. Tilow*, 54 Pa. St. 216, in 1867, and *Dickenson v. Dickenson*, 61 Id. 401, in 1869, our decisions have been uniform on this point."

In notes to *Dickinson v. Barber*, 6 Am. Dec. 58, and *Jackson v. Knifen*, 3 Id. 390, this subject is discussed.

## IDDINGS v. IDDINGS.

[7 REBECHART & RAWLE, 111.]

**EVIDENCE TO VARY WILL.**—Parol evidence is inadmissible to show that in drawing a will, the scrivener, through ignorance, inserted words that varied the meaning of the instrument, although such evidence may be received to explain a latent ambiguity, to rebut a resulting trust, or, in case of fraud, to annul the will.

**TESTATOR'S DECLARATIONS — WHEN ADMISSIBLE.**—Where a scrivener has stated in his examination that the testator furnished him with the matter for the will, it is admissible to ask the witness on cross-examination what those instructions were, in cases where the will has been attacked on the ground of imbecility and undue influence, but solely with a view to these points.

**ERROR** to the court of common pleas, to determine the validity of a writing purporting to be the last will and testament of Henry Iddings. The plaintiff having given in evidence to support the will the testimony of the subscribing witnesses, of whom the scrivener, Candor, was one, the defendants offered to prove a mistake in the drawing of the will through the ignorance of the scrivener. The mistake alleged was as follows: Iddings, the testator, having made certain advances to some of his children, and desiring to distribute his estate, mostly personalty, equally among them, gave to each a legacy which, with the sums advanced, placed them all on the same footing; but the scrivener inserted in the will a direction to the testators "not to cancel" any of the accounts between the testator and his children, so that the provisions for the children were very unequal. The mistake arose from the scrivener's ignorance of the meaning of the word "cancel." The defendants further offered to prove that one of the children was not named in the will, and that the will was extorted from the testator by the im-

portunity and hard usage of the son Thomas. The testator was ninety-two years old, and had ten children. This evidence was rejected. Candor having stated in his examination that the testator furnished him with the matter of the will, the defendants proposed to ask him what the instructions were, but the court rejected the testimony.

Verdict for the defendants in favor of the will.

*Greenough and Morrell*, for the plaintiffs in error.

*Hepborn*, *contra*.

By Court, TILGHMAN, C. J. This may be a very unfortunate mistake for some of the children of the testator, but I am clearly of the opinion that the evidence was not admissible. Our law requires that wills should be in writing, and proved by two witnesses. But if the writing is to be contradicted by parol evidence, the object of the law will be defeated and all certainty destroyed. It is very common for scriveners to make mistakes, particularly where they make use of technical words, which they are fond of doing. But if these mistakes were to be corrected by the scrivener's recollection of his conversation with the testator, it would open such a door for perjury and confusion, as would render wills of very little use. The rule of law, therefore, is that the writing is not to be altered, or explained by evidence aliunde. But this rule is not so unbending as to admit of no exception. It may happen that expressions apparently certain, may be rendered uncertain, by something peculiar in the person, or the subject to which they are applied. A man has two sons of the name of John, and devises land to his son John. The uncertainty is made to appear by parol evidence, that there are two sons called John. It is permitted, therefore, to remove this uncertainty by other parol evidence, showing which son was intended. Without this evidence the devise would be void, and in truth its object is to explain a doubt arising not on the will, but on a matter out of the will.

But if a doubt arise on the face of the will, an ambiguity patent, as it is called, it is not to be explained by parol evidence. So parol evidence has been admitted to rebut a resulting trust. Neither is this in contradiction of the written will. The trust is not declared by the will, but raised by operation of law. The legal presumption may, therefore, be encountered by parol evidence of the testator's intention. But the written will is preserved, without addition or diminution. In the case of fraud too, always the subject of the law's abhorrence, evidence

is admitted, not for the purpose of explaining or altering the will, but of showing it to be void. If instead of the will which a man has read, and intends to execute, another is substituted which he executes, it is evident that this is not his will, and proof of this fraud is permitted. So I apprehend, the truth might be shown, if by mistake the wrong paper was executed, and the testator died before there was time to correct the error. These are in general the cases in which parol evidence is allowed, although I will not say that there may not be others. Now the case before us is very different from any I have mentioned, for there is no latent ambiguity, no fraud, no resulting trust. The will was read to the testator, and executed by him, without any kind of mistake or imposition as to the paper itself. The mistake, if there was one, was in the meaning of a very common word, "cancel."

I have mentioned the rule of law, and will refer to good authorities to prove it, although I shall not undertake the useless and endless labor of examining all the cases in the books on the subject of parol evidence.

The case of *Brown v. Selwyn*, is strong to this point, and I select it, because it was affirmed by the house of lords in England, and has been recognized by our courts. In that case (reported in Cas. temp. Talb. 240, and 4 Bro. P. C. 176, 186), the testator had devised the residue of his estate to his two executors equally, and it was offered to be proved that he had given instructions to the person who drew his will to release a debt due on bond from one of his executors, but the evidence was rejected. In the case of *Mann v. Mann*, 1 Johns. Ch. 23 [7 Am. Dec. 416], where the law on this subject of parol evidence is laid down with great learning and accuracy by Chancellor Kent, *Brown v. Selwyn* is cited and relied on, as it is also in *Thrbert v. Swining*, decided by this court in the year 1795: 1 Yeates, 432. The case of *McDermot v. The United States Insurance Company*, 3 Serg. & R. 604, decided by us in 1818, adheres to the same principle of rejecting parol evidence, with the exceptions which I have mentioned. In short, it may be affirmed without hesitation that the current of authority runs strong in the same channel, although it cannot be asserted that all the cases are in unison. For my own part, being convinced by experience of the danger of parol evidence, I am more inclined to shut the door than throw it wider open.

I concur, therefore, with the opinion of the court below in present instance. But there is another bill of exceptions in



this cause. The counsel for the defendant offered to ask the same witness (the scrivener who drew the will) what were the instructions which he received from the testator. This question the court would not permit to be asked. But when it is considered that this witness who had been produced by the plaintiff, had before declared, on his examination in chief, "that the testator furnished him with the matter of the will," there can be no doubt, but the defendant ought to have been permitted to ask, in the cross-examination, what that matter was. Besides, as the defendants opposed the will in toto, on the ground of it being obtained from an old man above the age of ninety by the excessive importunity and harsh treatment of his son Thomas, it was very proper that the jury should be informed of all the circumstances attending the drawing and execution of it. Who were present, what the old man said, whether any person interfered, or prompted him, in giving the instructions, how it happened that the name of one of his children was entirely omitted (for that is said to be the case). All these and other circumstances might have been material in forming a judgment of the state of the testator's intellects.

The evidence, therefore, should have been admitted, solely with a view to that object, and at the same time the jury should have been warned in pointed terms, that if the testator was of sound mind, and free from duress, the will was to stand as it was written, without regard to the instructions. My opinion is, that in the second bill of exceptions there is error, and, therefore, the judgment should be reversed and a new trial ordered.

Judgment reversed, and a *venire facias de novo* awarded.

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The subjects treated of in this decision are fully examined in the note to *Jackson v. Knifen*, 3 Am. Dec. 395. See on the same point *Reel v. Reel*, 9 Id. 632, and *Rambler v. Tryon*, *ante*, 444.

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## THOMPSON v. SMITH.

[7 SERGEANT & RAWLE, 209.]

**STATUTE OF LIMITATIONS—SUCCESSIVE DISABILITIES.**—Where a title accrued twenty-one years before the commencement of the suit, and during the infancy of the plaintiffs, their claim will be barred as against an adverse possessor, if not sought to be enforced within ten years after arriving at full age, notwithstanding the claimants were females and married during infancy, and were *femes covert* at the time suit was brought.

**ERROR to the common pleas.** The question in this case was, whether the plaintiffs were entitled to recover in right of their

wives, Jane Thompson and Elizabeth McBriar, heirs of Archibald Lochrey. The title of Jane and Elizabeth first accrued during their infancy, more than twenty-one years before the commencement of this suit, which was not brought for more than ten years after their arriving at full age. It was contended that as Jane and Elizabeth had married during their infancy, the statute of limitations never began to run, they having been under a constant disability.

The jury were charged in favor of the defendant.

*Alexander*, for the plaintiffs in error.

*Forward, contra.*

By Court, TILGHMAN C. J. (after stating the point): The point has never been decided by this court; it is of considerable importance, and not free from difficulty. Before I consider the act of assembly, it may be proper to mention that the limitations of actions for the recovery of real property is essential to the peace of society, and therefore the construction of statutes on that subject ought not to be extended by equity, so as to contravene the main object of the legislature, by keeping up the uncertainty of title for a great and indefinite length of time.

Our statute, under the twenty-sixth of March, 1785, follows with very little variation, the English statute of 21 Jac. I., c. 16. The principal difference is, that our limitation is twenty-one years, the English but twenty. Our statute begins, with enacting "that no person shall support an action for the recovery of real property, of the seisin or possession of himself or his ancestors, nor declare or allege any other seisin or possession of himself or them, than within twenty-one years next before such action commenced."

Then follows a proviso "that if any person having such right or title, shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, or from and without the United States of America, then such person, and the heirs of such person, shall and may, notwithstanding the twenty-one years are expired, bring his or their action, or make his or their entry, as he or they might have done before the passing of this act, so as such person, or the heirs of such person, shall, within ten years next after attaining full age, discovery, soundness of mind, enlargement out of prison, or coming into the said United States, take benefit of, or sue for

the same, and no time after the said ten years; and in case the person shall die within the first term of ten years, under any of the disabilities aforesaid, the heirs of such person shall have the same benefit that such person could or might have had, by living until the disabilities should have ceased or been removed."

Now it is plain, that independently of the proviso, the plaintiffs would be barred from their action, because they neither made an entry, nor prosecuted an action, within twenty-one years from the time of their titles first accruing; but their case fell within the proviso, because at the time of their titles first accruing, they were infants. Then, according to the words of the statute, their title remained good, provided they had prosecuted it within ten years from the time of their coming of age. But they did not so prosecute it; consequently they are not helped by the proviso. The ten years are to be counted from the time of the ceasing or removing of the disability, which existed when the title first accrued. If other disabilities, accruing afterwards, were to be regarded, the right of action might be saved for centuries. The descent of the title upon infant females, and the marriage of those females under the age of twenty-one, might succeed each other *ad infinitum*.

The construction contended for by the plaintiffs would be attended with public inconvenience; it militates with the main object of the law, and is not agreeable to its words. It is contrary also to the current as well as the general spirit of authorities. It was once contended on the Stat. 4, H. VII., c. 24 (concerning fines), that although the period of five years allowed for claim began in the life of the ancestor, yet it should be suspended in case the title descended upon an infant heir. But that position was negatived in the case of *Stowell v. Zouch*, in the twentieth year of Elizabeth, Plowd. 356, and from that time it has been settled that when the statute has once begun to run, it shall never stop. This decision applies to the statute 21 Jac. 1, and to our statute of limitations. It is not the point directly before us; but shows that the judges have refused to extend the time of entry, or action, by equity. But the very point in question has received a direct adjudication in the courts of the highest respectability. In the case of *Eager v. Commonwealth*, 4 Mass. 182, the question was upon the time of limitation in writs of error. The savings in the proviso of the Massachusetts statute, concerning writ of error, are pretty much like those in our statute of limitations, except that only five

years are allowed from the ceasing of the disabilities. A female infant was entitled to a writ of error, and married during infancy. Held, that no regard should be paid to her coverture, but she was limited to five years from the time of her attaining the age of twenty-one. In *Demarest v. Wynkoop*, 3 Johns. Ch. 129 [8 Am. Dec. 467], the case was upon the New York statute of limitations, very much resembling our own. The title accrued to a female infant who married before she came of full age. The Chancellor Kent decided, on great consideration, as his learned argument shows, that no regard was to be paid to any disability, but that which existed at the time the title first accrued, and consequently the statute operated as a bar, unless an action was brought within ten years from the time of the infancy ceasing. A different opinion was held by the judges of the state of Connecticut, in the case of *Eaton v. Sanford*, 2 Day, 523. With great deference, however, to that opinion, it may be remarked that no reasons are assigned for it, and from the case of *Bush v. Bradley*, 4 Day, 298, it is presumed that the law is not regarded as settled.

I find no decision upon the point in the English courts prior to our Revolution. Their subsequent decisions are not permitted to be cited in the courts of Pennsylvania, and if they were, they would probably afford but little satisfaction on this subject. The argument in support of the plaintiff's construction is not void of plausibility.

There are certain disabilities which in the opinion of the legislature ought to stop the commencement of the running of the statute; it is reasonable, therefore, to infer that as long as any of these disabilities exist, the statute should not begin to run; because one disability is of as much weight as another. To this argument there is a plain, practical answer, that if the principle contended for applied to its full extent, the statute would be paralyzed. For suppose that during the ten years allowed for entry, etc., after the ceasing of the first disability, a second disability should occur, why shall you not wait till that has ceased; and in the meantime another may have occurred which will have an equal claim. But it cannot be pretended that after the first disability has ceased, and the ten years has begun to run, any regard shall be had to a new disability first accruing during the ten years. Our act of assembly is indeed not clearly or accurately expressed, when it speaks of a person dying under a disability within the ten years. But the meaning is, that if the title first descends or accrues to a per-

son under disability, and that person dies before the disability cease or be removed, his heir, whatever may be his condition as to ability or disability, shall have the same benefit that he himself might have had by living until the disability had ceased, that is to say, he shall have ten years from the death of his ancestor, but if the person to whom the title first descends or accrue, being then under a disability, shall live till the disability cease, then ten years and no more shall be allowed to him and his heir, in case he died within the ten years. There is no expression in the act which has a regard to any disability but one, viz: that which has existed when the title first descended or accrued, nor to the disability or any person but one, viz: the person to whom the title first descended or accrued.

The good effects intended by the statute might be frustrated by a series of disabilities. It was this consideration which induced the judges to take their stand against the extension of time by an equitable construction, so long ago as the reign of Elizabeth, and this induces me, after turning the question on every side, viewing it in all its bearings, and following it to all its consequences, to concur with the judges of New York and Massachusetts. I am of the opinion, that notwithstanding the marriage of Mrs. Thompson and Mrs. McBriar, during their infancy, and their continued coverture ever since, they are barred from their action because it was not commenced within ten years from the time of their arrival at full age.

The judgment is to be affirmed.

GIBSON, J., was sick and absent, and delivered no opinion.

DUNCAN, J., gave an opinion concurring with the chief justice.

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**SUCCESSIVE DISABILITIES.**—The doctrine that a party cannot take advantage of successive or cumulative disabilities, to prevent the running of the statute of limitations, and that he can avail himself only of those disabilities which existed when the right first descended or accrued, seems to be so thoroughly well settled, as scarcely to require the citation of authorities: *Bensell v. Chancellor*, 5 Wharton, 371; *Rankin v. Tebrook*, 6 Watts, 388; *Lynch v. Cox*, 23 Pa. St. 205; *McFarland v. Stone*, 17 Vt. 165; *Demarest v. Wynkoop*, 8 Am. Dec. 467; *DeKay v. Darrah*, 2 Green (N. J.), 294; *Friis v. Joiner*, 54 Ill. 101; *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 462; *Daniel v. Day*, 51 Ala. 431; *Harris v. McGovern*, 2 Sawyer (U. S.), 515; *Mercer v. Selden*, 1 How. (U. S.) 37; *Hogan v. Kurtz*, 94 U. S. 773; see, also, *Angell on Limitations*, secs. 477, 478, 479, and cases there cited. If, therefore, there is no disability when the right accrues, the statute begins to run, and no subsequent disability will stop it; so that if the ancestor dies, having a cause of action

against which the statute has commenced running, the right descends to his infant heir or devisee, the disability of the latter will not impede the statute: *Rogers v. Brown*, 6 Mo. 101; *Swearingen v. Robertson*, 39 Wis. 462; *Bozeman v. Browning*, 31 Ark. 364. It was once thought that a distinction should be made between successive disabilities in the same person and in different persons, and that if the first taker was under disability when the right accrued and before that disability was removed another was added, he should be allowed the benefit of both; that is to say, that any number of disabilities in the first taker might be cumulated so long as they were continuous. This doctrine is contended for in *Preston*, on Abst. of Tit. 340, and is laid down as law in *Blanchard on Limitation*, 21, 22. But it is settled, on good authority, that no such distinction exists: *Eager v. Commonwealth*, 4 Mass. 182; *Demarest v. Wynkoop*, 8 Am. Dec. 467; *Rankin v. Tenbrook*, 6 Watts, 391. Nor is there any distinction in this respect between voluntary and involuntary disabilities: *Demarest v. Wynkoop*.

## CUNNINGHAM v. IRWIN.

[7 SERGEANT & RAWLINS, 247.]

**NOTICE OF TAKING DEPOSITION.**—An order permitting a party to take a deposition "on reasonable notice," is good, if such has been the practice of the court.

**NECESSARIES FURNISHED WIFE LIVING SEPARATE.**—The husband is liable for the necessities furnished his wife during their separation, though the separation be by agreement, if she offer to return and he refuses to receive her, and has provided no means for her support.

**IDEM—WHAT ARE NECESSARIES.**—In such case, necessities are those things suitable to the rank and condition of the husband; and he is not liable merely for the difference between the amount she earns and the value of the necessities; he must support her himself, or pay those who do so in a reasonable manner.

**WIFE'S OFFER TO RETURN.**—In an action for necessities furnished the defendant's wife living apart from him, it is competent to show that she solicited her husband to take her back as his wife, and had offered to return, but that he had refused to receive her.

**IDEM—PENDING ACTION FOR DIVORCE.**—And it makes no difference whether the offer to return was made before or after a bill filed by her for a divorce. The husband is not exempted from liability to furnish his wife necessities pending an action against him for divorce.

**IN ERROR.** The opinion states the case, which came before the court on several bills of exceptions taken by the defendant Cunningham.

*Baldwin*, for the plaintiff in error.

*Hopkins*, contra.

By Court, **TILGHMAN, C. J.** This is an action brought by Sarah Irwin, the plaintiff below, against Nicholas Cunningham,

for board and necessaries furnished by plaintiff to Mary, the wife of the said Nicholas. On the trial of the cause, several exceptions were taken by defendant's counsel to the opinion of the court on points of evidence, and an exception also to the charge of the court.

1. The first exception was, to the admission of the depositions of John and Patrick Magee, taken *ex parte* under a rule of court, on six days' notice.

The objection is, that the six days' notice were not specified in the rule of court. The rule was entered for taking the depositions on reasonable notice, and then the plaintiff gave notice to the defendant that the depositions would be taken at a certain time and place (allowing six days). As the same point arose in the case of *McConnell v. McCoy*, which was decided this term, it will be sufficient to say that under that decision these depositions were good evidence. I will barely add, that this court was induced to admit the depositions for two reasons one, that the general practice of the court of common pleas for several years past has been, to enter rules for taking depositions in the manner this rule was entered; the other, that the party to whom the notice is given is not injured by it, because he receives actual notice of the time and place of taking the deposition; and if the time is unreasonably short, he may avail himself of that circumstance, on a motion to suppress the deposition, or perhaps by application to a judge out of court, to have the time enlarged, on satisfying him that it is unreasonable.

2. The next exception was, to the admission of the deposition of Samuel Douglass, because the matter contained in it was irrelevant.

To comprehend the force of this objection, it will be necessary to consider the nature of this action, and some of the circumstances attending the plaintiff's case. I have said before, that the ground of the action was board and necessaries found for the defendant's wife. Before Douglass' deposition was offered, evidence had been given to prove the defendant's marriage. Evidence had also been given of a libel by the wife for a divorce, on account of the husband's desertion of her. It was a very singular case. The defendant and his wife, if she was his wife, came from Ireland many years before the commencement of the suit for divorce, and had lived separately in Pittsburgh, without the least suspicion of their marriage. Consequently, it was incumbent on the plaintiff to show that under such mysterious circumstances, the defendant was liable for

necessaries furnished to his wife; and particularly, that the wife was willing, and had offered to live with him, for there was no proof that he ever used her ill, or turned her out of his house. The deposition of Douglass went to prove that he was employed by Mrs. Cunningham (who was known by the name of Mary Magee), as counsel, and informed by her that the only thing she wanted was, "to go and live with her husband, and be treated as his wife; and that she would, on her part, conduct herself towards him as she had done before their separation;" and that shortly afterwards he waited on the defendant, and informed him of Mrs. Cunningham's wish to live with him, who answered that her living with him was out of the question; that her claim was a stale one; that he was not bound in law or justice to take her or maintain her, but rather than have himself exposed publicly by a suit in court, he would give her a sum of money, provided she would leave the country.

This evidence was certainly very material, as it tended to remove a main obstacle in the way of the plaintiff's case, and to explain the doubt, whether the living separately was the fault of the husband or the wife. It is not quite certain whether Mrs. Cunningham's conversation with Mr. Douglas, and his communication to the defendant was before or after the filing of a libel for a divorce, but that is immaterial, as I shall show when I come to consider the exception to the charge of the court. I have no doubt, therefore, that Douglass' deposition was evidence.

3. The third exception was to the evidence of James Riddle, Esq. I am very clear that this evidence was legal, and highly material to the plaintiff's cause. For Mr. Riddle proved that before the commencement of a suit for divorce, Mrs. Cunningham informed him of her situation, and her earnest desire to be restored to her husband, and solicited him to use his influence as a friend of Mr. Cunningham to effect a reconciliation, and that he did endeavor to effect it, but to no purpose.

4. The fourth exception was to the evidence of Mrs. Dunning, who proved the situation of Mrs. Cunningham some time previous to the period of her boarding with the plaintiff. The objection to the evidence is that her situation at that time was immaterial. But I do not think so. It was not immaterial to show the general state of her health and behavior, and particularly that she had no known means of living, but by her own labor. In a question of this kind, where the blame of a separation is attempted to be thrown on the wife, considerable lati-



tude should be allowed to the evidence, in order to show her general conduct and manner of life during the separation. I am of opinion, therefore, that there is no ground for this exception.

As to the charge of the court, it certainly was, upon the whole, extremely favorable to the defendant. But there are one or two points on which his counsel raised objections. The principal one is, that the husband is not liable for necessities furnished to his wife during her suit for a divorce. Was she not his wife until the decree of divorce was pronounced? And if she was, why should he not support her?

Consider the basis of the libel for divorce. Desertion by the husband. If she was deserted, was she to be reduced to the alternative of perishing, or subsisting on charity? What principle of law or justice absolved the husband from the duty of maintaining his wife, during a separation for which she was not to blame? Was any fund provided to him for her support? None at all. But the cause of separation, it is said, was a mystery. Perhaps it was voluntary on both sides. But even if it were, and no means of support were provided for the wife, no agreement of hers would discharge her husband from the expense of supporting her, if she requested to come back, and he refused to receive her. Whether she did so request, was submitted to the jury, with remarks on the evidence by the court, not only impartial, but very indulgent to the defendant. The jury were told to pay no regard to the wife's offer to return, unless they were satisfied that it was made in sincerity and good faith, without any view to trick or artifice. But the defendant's counsel have contended that the suit for divorce and offer to return were inconsistent. It would certainly be inconsistent to offer to return, and at the same time persist in the suit for divorce. But there would have been no inconsistency in offering to return, and discontinuing the suit, if the offer were accepted. And that such was the intention, as to any offers made, pending the suit, must be presumed; for no woman in her senses could expect or wish for a divorce from the bond of marriage, founded on the desertion of her husband, at the moment she was living with him. Nor if she had wished it, would any court have been so absurd as to decree it. But in this case, there was no encouragement to discontinue the suit, because all the efforts of the wife to return to her husband were promptly and peremptorily rejected. I perfectly agree, therefore, with the opinion of the president of the common

pleas, that the defendant was liable for necessities, until the decree of divorce was pronounced.

Another objection to the charge of the court was, that the jury were not told that the husband was not liable for necessities, if the wife had means of supporting herself. I must remark that it does not appear by the record that the court was requested by the defendant's counsel to give any opinion on that point, nor do I perceive that it arose out of the evidence; for there was no evidence of the wife's having any property of her own, but the contrary. The jury were fairly told "that the necessities should be suitable to the rank and estate of the husband; in other words, according to the condition of the parties in life," and that "clothing, medicine, boarding and lodging, came under the meaning of necessities." And undoubtedly so is the law. I do not see how it could have been laid down more accurately. If the wife, during great part of her separation, had labored hard for subsistence, and lived in a rank inferior to her husband's situation, that was no reason why she should not be supported agreeably to his situation when she offered to return, and he refused her. Nor had he a right to say that she should earn all she could by her labor, and he would only be answerable for the difference between her earnings and the amount of the expenses necessary for her support. Such is not the law of husband and wife. The husband must support his wife himself, or pay those who do support her in a reasonable manner, and of that the jury are to judge. Upon the whole, I am of opinion that there was no error in the record, and therefore the judgment should be affirmed.

Judgment affirmed.

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The various questions arising out of the husband's liability to maintain his wife have been so often answered by the courts, as to leave but little doubt concerning the mutual rights and obligations of the parties to the marital relation. That a husband is liable to furnish his wife with necessities was determined in the leading cases of *Manby v. Scott*, 1 Lev. 4, and *Seaton v. Benedict*, 5 Bing. 28, also reported in 2 Smith's Leading Cases, and it has been laid down in a series of decisions by all the courts of this country: *Keller v. Phillips*, 39 N. Y. 351; *Furlong v. Hysom*, 35 Me. 332; *Tebbets v. Hapgood*, 34 N. H. 420; *Morgan v. Hughes*, 20 Tex. 141; *Hughes v. Chadwick*, 6 Ala. 651; *Bevier v. Galloway*, 71 Ill. 517; *Raynes v. Bennett*, 114 Mass. 424; *Brown v. Worden*, 39 Wis. 432; *McCutchen v. McGahay*, 6 Am. Dec. 373.

WHAT ARE NECESSARIES.—The condition in life and social position of the husband are the criterions by which to determine what are necessities to which the wife is entitled: *Barr v. Armstrong*, 56 Mo. 577; *Hall v. Weir*, 1 Allen, 261; *Cunningham v. Reardon*, 98 Mass. 538; *Raynes v. Bennett*, 124 Id.

424, in which case it is said, 429: "As a general rule the term 'necessaries' applied to a wife, is not confined to articles of food or clothing required to sustain life or preserve decency, but includes such articles of utility as maintain her according to the estate and degree of her husband." In *St. John's Parish v. Bronson*, 40 Conn. 75, an interesting point was raised for the consideration of the court; whether the rent of a pew in church where divine worship is held and religious instruction given, is included in the list of articles known at the common law as necessaries. Park, J., with whom the other judges concurred, in examining this question, remarked: "It is said in the books that necessaries consist only of food, drink, clothing, washing, physic, instruction and a suitable residence: *Shelton v. Pendleton*, 18 Conn. 417; *Whittingham v. Hill*, Cro. Jac. 490; *Clancy on Husband and Wife*, 23; 2 Kent's Com. 146; *Finch*, 103; *Co. Lit.* 172 a; 1 Wooddeson Lect. 402; *Bingham on Infancy*, 87; *Baker v. Lovett*, 6 Mass. 80; *Munson v. Washband*, 31 Conn. 76. By instruction is here meant some degree of education as taught in the schools: *Stanton v. Willson*, 3 Day, 37; *Metcalf on Contracts*, 69; *Middlebury College v. Chandler*, 16 Vt. 683." After considering the constitutional provision relative to divine worship, his honor concluded that religious instruction is not included in the list of necessaries. See further, 1 Bishop on Marriage and Divorce, sec. 554. Medical services are considered necessaries: *Bevier v. Galloway*, 71 Ill. 517; *Cochran v. Lee*, 24 Ala. 380.

**COUNSEL FEES.**—Whether the husband is liable for the professional services rendered his wife in prosecuting or defending an action for divorce, is a question which has been much debated by the courts. The weight of authority, however, seems to be against an action at law in favor of the wife's attorney for his services in the divorce suit. *Morrison v. Holt*, 42 N. H. 478, denied the attorney's right to recover, he having commenced an action of divorce on her behalf, against the husband, on the ground of adultery. The bill for divorce was dismissed by reason of the agreement of the husband and wife; but it was admitted that there was a good ground for divorce. The court, in 42 N. H., stated the husband's liability to be for the support and protection of the wife, and, as the proceedings in divorce were for neither of these objects, but looked "merely to the enforcement of a right to a change of future condition, that she claimed had arisen from his previous fault," the judgment was rendered for the defendant. This decision was affirmed in *Ray v. Adden*, 50 N. H. 82, where the plaintiff had been the attorney for the defendant's wife in an action of divorce prosecuted against her for adultery, but dismissed "without prejudice." The same position is maintained in *Dow v. Eyster*, 79 Ill. 254; *Sheldon v. Pendleton*, 18 Conn. 417; *Johnson v. Williams*, 3 Iowa, 97; *Williams v. Monroe*, 18 B. Mon. 514; *Wing v. Hurlbert*, 15 Vt. 607; *Parsons v. Dorrington*, 32 Ala. 227.

In these several cases, the common law right of the wife to alimony *pendente lite*, is recognized as being necessary to the prosecution or defense of the action for divorce. It is on the ground that the prosecution or defense by the wife is not necessary for her safety or protection as wife, together with the power of the wife's counsel to obtain compensation for his services through the medium of this allowance of alimony out of the husband's property, that the courts have refused to permit him to look besides to the husband.

The recent determination of this delicate question by the supreme court of Iowa, in *Porter v. Briggs*, 38 Iowa, 166, in favor of the wife's right to have her counsel fees paid by her husband who has prosecuted an ineffectual action for divorce on account of her adultery, re-opens the discussion. The argument urged by the court is, that expenses incurred in defending her good

name, whether assailed by her husband or a stranger, are properly classed as necessities; that whatever is necessary for the protection of her person, the husband is bound to supply, and why should he be exempt from protecting that which is more precious than life to a virtuous woman? The court also contend that the husband would be obliged to pay for medical attendance made requisite by his own harsh treatment of his wife, and assert that there is no difference between that case, and one where she is obliged to resort to legal assistance to restore her reputation. It did not appear directly for the consideration of the court that the plaintiff had received any fee as part of the alimony, if any, allowed the wife in the suit for divorce. The reasoning of this case viewed in the light of the decisions holding a different doctrine, would lead to the rule that the husband is only liable for the counsel fees of his wife against whom he has brought an action for divorce, and who recovered judgment on the merits, when no allowance has been made by the court as alimony, out of which counsel might have secured compensation. The relative functions of the court and jury in questions relating to necessities may be thus stated. The court, as a question of law, should instruct the jury what the law regards as necessities, and when and under what conditions a party is entitled to claim them; whether articles of a certain kind in the particular case, under such rules, are necessities, must be submitted to the jury as a question of fact: *Proffatt on Jury Trial*, sec. 299; *McKenna v. Merry*, 61 Ill. 177.

**LIVING APART BY HUSBAND'S DEFAULT.**—It being the duty of the husband to supply his wife with proper support and maintenance, if he, by his conduct, render the home unsuitable for her to live in, or wrongfully send her away without making any provision for her support, her right to be supplied with necessities goes with her, and she carries with her the power to charge the husband to that extent: *Ross v. Ross*, 69 Ill. 569; *Zeigler v. David*, 23 Ala. 127; *Wray v. Cox*, 24 Id. 337; *Billing v. Pitcher*, 7 B. Mon. 458; *Allen v. Aldrich*, 29 N. H. 63; *Hultz v. Gibbs*, 66 Pa. St. 360.

But as the husband has the right primarily to say what are necessities with respect to his wife, and who shall furnish them: *Woodward v. Barnes*, 43 Vt. 330; *Bevier v. Galloway*, 71 Ill. 517; the person seeking to charge the husband for necessities supplied to the wife must show not only that the articles, whose value is sought to be recovered, were necessities, but also that the husband has neglected to supply them, the presumption being that he is not liable: *Rea v. Durkee*, 25 Ill. 503; *Mitchell v. Treanor*, 11 Ga. 324; *Keller v. Phillips*, 40 Barb. 390; *Kimball v. Keyes*, 11 Wend. 33. And if it appear that the husband did not fail to provide his wife with necessities suitable to her wants and situation in society, and his condition in life, he cannot be charged for articles sold to the wife by a tradesman: *Barr v. Armstrong*, 56 Mo. 577. Where the husband is in default, and has not made provision for his wife, he cannot, by a notice to tradesmen not to trust his wife on his credit, thereby release himself from responsibility for her support. To allow a husband to drive his wife from his house, without fault on her part, to deny the means of subsistence to her himself, and to forbid others to aid her at his expense, would be to take such an advantage of the condition of woman as the law never would tolerate. Although *Manby v. Scott* based the liability of the husband on the contracts of his wife for necessities upon the ground of agency, a doctrine which subsequent English authorities appear to have followed, yet, in this country, the cases recognize the husband's liability on such contracts, notwithstanding his express orders to tradesmen and others not to furnish his wife with sustenance and protection. On the strict con-

struction of the husband's obligation, founded upon reasons of an implied agency, the wife, however innocent, might very easily be debarred from obtaining maintenance.

The spirit of the American courts upon this point is well expressed by Justice Smith in *Cromwell v. Benjamin*, 41 Barb. 558: "It is a settled principle in the law of husband and wife, that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessaries to the wife so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge his obligation by supplying her with necessaries himself, or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessaries; but if he does not himself provide for her support, he is legally liable for necessaries furnished to her by tradesmen, even though against his orders." The principle was affirmed in *Daubney v. Hughes*, 60 N. Y. 187, Church, C. J., saying a "general notice (not to support defendant's wife), even if it came to the knowledge of the plaintiff, would \* \* \* not relieve the defendant from his obligation to furnish suitable support for his wife." So, also, *Rea v. Durkee*, 25 Ill. 503; *Woodward v. Barnes*, 43 Vt. 330; *Black v. Bryan*, 18 Tex. 467.

**LIVING SEPARATE—WIFE'S DEFAULT.**—The duties of the wife as wife, form the consideration for the husband's liability for her maintenance. If she violate her obligations to him, if, without cause, she refuse to live with him, and desert him, her contracts for necessaries will not bind her husband: *Brown v. Mudgett*, 40 Vt. 68; *Sturtevant v. Sarin*, 19 Wis. 268; *Allen v. Aldrich*, 29 N. H. 63; *Olson v. Heritage*, 45 Ind. 73; *Mumroe County v. Budlong*, 51 Barb. 493; *McCutchen v. McGahay*, 6 Am. Dec. 379; *Porter v. Bobb*, 25 Mo. 36. Upon her offer to return, his liability is revived, and continues from that time: *McCutchen v. McGahay*, provided she did not elope with an adulterer, and *Cunningham v. Irwin*, *supra*. If the husband receive his wife back and live with her as such, he must thenceforth support her, and supply her with necessaries as though no separation had taken place: *Williams v. Prince*, 3 Strob. 492; *Olson v. Heritage*, 45 Ind. 73; *Henderson v. Stringer*, 2 Dana, 291. But by so receiving his wife, the husband will not render himself liable for necessaries furnished her during her wrongful separation from him: *Williams v. Prince*, and *Olson v. Heritage*, *supra*.

**SEPARATION BY CONSENT.**—Where the husband and wife agree to live apart, he is still bound to see that she is provided with those necessaries to which, as his wife, she is entitled: *Frost v. Willis*, 13 Vt. 202; *Rumney v. Keyes*, 7 N. H. 571. But if he has furnished her with a suitable allowance, he will not be bound: *Mott v. Comstock*, 8 Wend. 544; *Caney v. Patton*, 2 Ashm. 140; *Kemp v. Downham*, 5 Harring. 517. And whether such allowance is sufficient for her support, is a question for the jury: *Pearson v. Darrington*, 32 Ala. 227.

## SMITH v. MERCHANT.

[7 SERGEANT & RAWLE, 260.]

**RETROSPECTIVE ACT VALID.**—An act authorizing the recovery of certain money in the hands of commissioners, is not an act dissolving a contract without the consent of parties.

ACTION brought by the executors of David Merchand, the plaintiffs below, against Jacob Smith, late one of the commissioners of Westmoreland county, for the recovery of money paid by said David to the said Jacob, while a commissioner as aforesaid, on account of certain tracts of land sold by the commissioners, and purchased by David. The action was founded on an act passed March 24, 1817, entitled "An Act authorizing the recovery of money in the hands of certain commissioners." By this act it was enacted that the purchasers of any lands sold at commissioner's sales for taxes, previous to the year 1800, or their heirs, executors, or administrators, should be authorized to recover any sums of money paid to any commissioners beyond the amount of the taxes and costs for which such lands were sold, and which had not been paid by the said commissioners to the real owner of such land, or into the county treasury; *provided*, that before suit commenced, a bond of indemnity with sufficient sureties to the commissioners should be tendered, and a release of all interest or title to such lands, under such sale, be duly executed by such purchasers, or by their executors or administrators (who were authorized by the act to execute such deed), and to be recorded in the office of the recorder of the county in which such sales were made.

The plaintiff gave evidence of the sale by the commissioners, the purchase by David, and payment to one of the commissioners of five hundred and sixty-seven dollars more than the taxes and costs. They also gave evidence of a bond of indemnity, with sureties, executed by them, and tendered to the defendant, and of a deed of release from them to the persons in whose names the taxes were laid, and as the property of whom the lands were sold, duly executed and recorded, before the commencement of the suit. The defendant demurred to this evidence, and the court gave judgment for the plaintiffs.

*Forward*, for the plaintiff in error.

*Alexander, contra.*

By Court, TILGHMAN, C. J. The counsel for the plaintiffs in error has relied principally on two points: First. That the release does not appear to have been made by the proper persons. The commissioners often take for granted that the lands belong to the persons for whose use the original warrant issued, whereas, very often such warrantees are not the owners at the time of the sale for taxes. The answer to this objection is short and decisive. The demurrer confesses everything which the

jury might have inferred from the evidence, and when taxes are laid on land as the property of the warrantees, and they are sold as such by the commissioners, this is *prima facie* evidence of property, and the jury may infer, in the absence of all other evidence, that the property was in such warrantees. The second point made by the plaintiff in error is, that an act of assembly, on which this action is founded, was void, because it dissolves a contract without the consent of the parties. But this does not appear to be the fact.

The parties to the commissioners' sale were the commissioners and the purchaser. The commissioners were but trustees for the benefit of the public, appointed under the authority of the legislature and subject to their control. They pretend to no private right. There was, therefore, no invasion of any right of theirs. And as to the other party, the purchaser, his consent is proved by the bringing of this suit, which is founded on a dissolution of the contract. The truth is, that this act of assembly was very salutary—it corrected a great public abuse. Most of these commissioners' sales were void, because not conducted according to law; and the owners of the land, knowing them to be void, would not receive the money paid by the purchasers, beyond the amount of taxes and costs; consequently this money remained in the hands of the commissioners, to their private benefit.

The act of assembly was made to authorize the recovery of this money, and is confined to cases in which sales had been made previous to the year 1800, that is at least seventeen years before the passing of this act. Now, surely, when the money had lain thus long in the hands of the commissioners, without demand by those persons who had been the former owners, it was sufficiently evident that these persons considered the sale as void, and never intended to demand the money. Besides, these former owners were no parties to the contract of sale, and no contract of theirs was violated by dissolving that contract. But even if they had any subsisting right under that contract, it is not taken away by this act of assembly; on the contrary the act provides, that before the plaintiffs could recover against the commissioner they should give him an indemnifying bond. But if it should ever happen that a suit should be brought by the person whose land was sold for taxes, against the commissioners for the surplus received by them, beyond the amount of taxes and costs (an event extremely improbable, as it could only be when the land had been sold by the commissioners for

more than its value), it would be difficult to support the action against the strong presumption arising from an acquiescence of seventeen years. Be that as it may, however, it is the opinion of the court, that the act of assembly violated no contract against the consent of any person whose consent was necessary, and was therefore valid. The judgment of the court of common pleas is to be affirmed.

Judgment affirmed.

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See note to *Goalen v. Stonington*, ante, 121.

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### McDERMOT v. LAWRENCE.

[7 SERGEANT & RAWLE, 429.]

**MORTGAGING REALTY OF PARTNERSHIP.** — Where a partner mortgaged his interest in partnership premises to a *bona fide* mortgagee without notice of any existing partnership debts, it was held that the mortgagee could hold as against creditors of the partnership.

POINT reserved for the opinion of the court, upon the following facts: Harrison, Jones, McIlhenny and Encell, purchased from Pemberton a lot of ground, for which they took a conveyance in fee-simple as tenants in common, charged with a ground rent of one hundred dollars a year, the only consideration. The grantees were partners in a glass work, by the name of Thomas Harrison & Co. McIlhenny sold all his interest in the lot to Martin, June 27, 1808, subject to his proportion of ground rent, and subject to McIlhenny's proportion of the debts then due from the firm of Thomas Harrison & Co. On December 31, 1808, Encell released all his interest to Harrison, Jones and Martin. Buildings necessary for glass works were erected on the lot bought of Pemberton, but whether at the expense of the partnership or of the individual members, did not appear. Harrison & Co. discontinued the business of glass making in 1811, and rented the buildings to others. In September, 1816, Martin mortgaged his individual third of the premises to the plaintiff for a private debt; and the question was, whether the plaintiff could hold under his mortgage without being subject to the debts of Harrison & Co., contracted subsequent to June 27, 1808.

*J. B. Ingersoll*, for the plaintiff.

*Bradford and Brown*, contra, contended that the land was partnership property, and that there was no distinction between



real and personal property held and used for partnership purposes: *Luke v. Craddock*, 2 P. Wms. 188; *Foster v. Hale*, 3 Ves. jun. 696; *Bell v. Phyn*, 7 Id. 453; *Gilmore v. North American Land Co.*, 1 Pet. 460; *Forde v. Herron*, 4 Munf. 316; Watts on Partnership, 47, 75, 88; Sugd. on Vendors, 438, 439; Coop. B. L. 229; *Lindon v. Gorham*, 1 Gall. 367.

By Court, TILGHMAN, C. J. (after stating the case): How far land conveyed to partners as tenants in common shall be considered as partnership property, and whether it changes its nature, and becomes personal estate, has been the subject of discussion in England and in some of the United States of America, but does not appear to have been decided by this court. Land, except for the purpose of erecting necessary buildings, is not naturally an object of trade or commerce. Yet, there is no doubt that by the agreement of the partners, it may be brought into the stock, and considered as personal property as far as concerns themselves, and their heirs and personal representatives. It was so decreed by Lord Eldon, in *Ripley v. Waterworth*, 7 Ves. jun. 424.

But if a conveyance of land is taken to partners as tenants in common, without mention of any agreement to consider it as stock, and afterwards a stranger purchases from one of the partners, it would be unjust, if without notice, he should be affected by any private agreement. It is very material in the case before the court, that the deed from Pemberton to Harrison & Co. is a simple conveyance to them as tenants in common, and that no purchase-money could have been paid out of the partnership fund, as the only consideration was the ground rent of one hundred dollars, for which each of the partners was responsible. Under such circumstances, I do not think that any case decided in England or America goes so far as to make it subject to partnership debts, to the prejudice of a purchaser without notice.

In the case of *Thompson v. Dixon*, 3 Bro. Ch. 198 (by the name of *Thornton v. Dixon*), where land on which there were mills for partnership purposes was held by the partners, who were paper makers, as tenants in common, Lord Thurlow was at first of opinion that after the dissolution of the partnership, this estate should be considered as personal property; but upon reflection, he changed his mind, and decreed that it should retain its original nature, inasmuch as the partners had made no agreement sufficient to convert it into personal estate. This is a very strong case, as the mills were used in the partnership

business. And on the authority of it, the master of the rolls, Sir William Grant, founded his decrees in the cases of *Bell v. Phyn*, 7 Ves. jun. 453; and *Balmain v. Shore*, 9 Id. 500.

In *Bell v. Phyn*, partners living in England purchased an estate in the island of Granada, and paid for it out of the partnership stock: *Held*, that it remained real property.

In *Balmain v. Shore*, the partners were potters, and made use of the property in the course of their business; yet, the master of the rolls decreed it to be real estate, and declared that after the case of *Thompson v. Dixon*, "it was not a question which admitted of argument."

Yet it is said that Lord Eldon has been of a different opinion. In a note to the case of *Bell v. Phyn*, 7 Ves. jun. 453 (American ed., by M. Carey & Son, with notes by E. D. Ingraham, Esq.), it appears that in the case of *Selkrigg v. Davies*, 1 Dow. P. C. 231, Lord Eldon said "his own individual opinion was that all property involved in a partnership concern ought to be considered as personal," and that he afterwards decided, in the case of *Thomson v. Deveines*, reported in the appendix to Montague on Partnership, 97, that real was to be considered as personal where it is purchased in whole or in part with partnership funds. I know of no other English cases which bear on this subject, and these were in disputes between the heirs and personal representatives of deceased partners. In the supreme court of New York, it was decided in the case of *Coles v. Coles*, 15 Johns. 159, which was an action by the administrators of a deceased partner against the surviving partner, that a lot of ground and still-house, used for partnership purposes, the legal estate of which was vested in the partners as tenants in common, was to be considered, not as partnership property, but the separate property of the two partners. But I shall now revert to two American cases, where creditors were concerned.

In *Goodwin v. Richardson*, 11 Mass. 469, two partners took a mortgage of real estate to secure a partnership debt. They afterwards foreclosed the mortgage, and then one of the partners died, the partnership being insolvent. It was decided that the moiety of the deceased partner was to be considered as his private estate; but I am not certain whether the decision of this case might not have been in some degree influenced by a statute of Massachusetts, respecting the payment of the debts of deceased persons.

In *Lorde v. Herron*, in the supreme court of appeals in Virginia, 4 Munf. 316, two partners took a conveyance of real

property in fee, as tenants in common, which was paid for, in part at least, out of the partnership funds, but there was no evidence of any specific agreement that it should be considered as partnership stock. One of the partners, who was indebted to the partnership, conveyed his moiety in security for a private debt of his own, and it was decided that the other partner had no equitable lien on the property sold, because the purchaser had no notice of the transactions between the partners, but trusted to the title papers, by which they appeared to be tenants in common.

There is good sense in this decision, and it bears strongly on the case before us. In the deed from Pemberton to Harrison & Co., there is no trace of partnership, and although the defendant relies on the deed from McIlhenny to Martin, by which Martin took an undivided third part, subject to a third part of the debts then due from the partnership, that could be no notice to one who purchased from Martin, eight years afterwards, that the property was to be subject to other debts subsequently contracted. On the subject of notice it is a circumstance of weight, that when the mortgage was executed to the plaintiff, the glass works were not carried on by Harrison & Co., but had been discontinued by them five years before; so that the plaintiff might well suppose that the property was not then involved in any partnership transaction. This is a subject of very great importance, and I shall not commit myself by any general opinion on it.

But certainly where it is the intention of partners to bring real property into the common stock, it would be prudent to put their agreement on record, in order that purchasers may not be deceived. There is no decision which goes so far as to affect a mortgagee circumstanced like the plaintiff in this suit. Even Lord Eldon has not considered the property as personal, unless it was made so by the agreement of the partners, or purchased with their funds. I am therefore of opinion that the plaintiff is not to be subject to any partnership debts, which were not contracted before the twenty-seventh June, 1808.

## WALTON v. SINGLETON.

[7 SHERMAN &amp; RAWLE, 451.]

**WORDS ACTIONABLE PER SE.**—To say of another, "You got to bed with Sarah M.," is actionable *per se*; so, also, "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being continually riding them;" and "He has committed fornication," although the person to whom the words referred may have been a married man.

**ERROR to the district court.** Slander brought by Jesse Walton against William Singleton; the words uttered for which recovery was sought were: "He got to bed with Sarah McGargle." "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being a continually a riding them;" and "He has committed fornication." A verdict was found for the plaintiff for five thousand six hundred dollars, of which two thousand six hundred was remitted. The judgment being arrested, this writ was taken.

*P. A. Browne and J. R. Ingersoll* for the plaintiff in error.

*D. P. Brown and Chauncey*, contra.

By Court, DUNCAN, J. The action was slander, set out in twelve counts, and judgment arrested. The counts objected to are those in which it was stated: 1. That the plaintiff got to bed with Sarah McGargle; 2. He is such a whoring fellow, that it is with difficulty he can keep a girl about the house, being continually a riding them; 3. That he had committed fornication, meaning thereby to charge him with being guilty of the crime of fornication, and it appearing in the declaration that he was a married man, the charge could not possibly be true.

Ancient precedents in actions for words, are of less authority than in any other case. There is a principle of common sense that now governs in their construction; it is that words shall not be taken in the mildest sense, nor shall they be strained by any forced construction, beyond their natural meaning and common acceptance. Courts and juries will understand them in the same way other people would. We are not to examine dictionaries, nor turn to our law books to find out their legal technical meaning.

The question is, what do these words import? There is no offense, the imputation of which can be conveyed in so many multiplied forms and figures, as that of incontinence. The charge is seldom made even by the most vulgar and obscene in

broad and coarse language. Can any reasonable man doubt of the signification of these words, in any of these counts? Can it be seriously doubted, but that the defendant intended to defame the plaintiff, and charge him with unlawful sexual intercourse? Is this their meaning or is it a foreign construction? If these words are not actionable, there is no security afforded by the law to reputation. She first stated that Walton got to bed with Sarah McGargle. Now it is said, that he might have got to bed innocently with her, or he might have got to bed to her and left it *re infecta*. In one of the old cases it was mooted, whether to say of a woman I. S. had the use of her body, was actionable, for he might have used it as a surgeon or physician. But this nonsense of the old cases is now done away, and the modern rule is such as I have stated it.

It is admitted, that if the words were, he was in bed with her, they would be actionable. The hearers would not be governed in the construction of them by such hair strokes, and it has puzzled me not a little, to find the difference, even on the nicest critical examination. To go to bed with, is to be in bed with. Indeed if there is a difference, the former contains a more direct charge than the latter; they are more frequently used to signify this intercourse. In all times, in every age, and by all writers, sacred and profane, in the language of scripture and in the language of law, these words, except as between man and wife, significantly impute illicit intercourse, and with them it imports the rite of hallowed love. In the law it has the same meaning as a divorce from bed and board. There the divorce is not the suspension of the husband's right to go to the bedside of his wife, but of the highest connubial right. He might visit her when sick in bed; but if he got in bed with her this would *ipso facto* amount to a dissolution of the divorce, and the most perfect reconciliation. In cases of *crim. con.* if the chambermaid swore that she saw the gentleman go to bed to her mistress, though she did not swear that he was in bed with her, a jury would not doubt of the *crim. con.* This set of words is clearly actionable, no other construction can be put on them than the jury have done.

The second set are objected to, because they are only adjective, imputing a disposition to whore, but not whoring; intention, and abortive attempts, but not an act done; a whorish intention; and if this be so, there is much in the objection, and the court were right in reversing the judgment.

It is somewhere said it is not worth while to be very learned

in this kind of cases, yet we must be governed by the law, which certainly is that mere intention, as mere lust, is not actionable.

But to say of one he is a whoring fellow, is a charge of whoredom. The distinction is between words merely adjective, as thievish, and participles of thieving; the latter are actionable, because they import an act done; the former are not, because they import only an intention.

Murdering rogue, actionable; murderous quean, not so. Thievish knave, not actionable, because they import only a corrupt inclination to theft: 4 Co. 19; but to call a man a thieving rogue is, because they import that a man has committed an act of theft: Sid. 673. But there is in 4 Bac. 501, a modern case, *Gardiner v. Atwater*, 29 Geo. II., where this doctrine of adjective slander is put on its true ground. These words, thou art a pitiful, sheep-stealing fellow, were, on motion in arrest of judgment, held actionable, because a charge of felony is thereby imputed; and *per curiam* the same nicety is not as heretofore observed in construing words; for the rule now adhered to by all the courts is to understand them in their usual and obvious sense. The subsequent words do not efface the stain, but impress it more deeply on the character.

He is a whoring fellow, and it is with difficulty he can keep a girl about the house; he is continually a riding them. This is making him out a whoring fellow indeed; he is so very bad, that in his own house, under the roof with his wife, he is continually riding the girls. Where words are a plain and direct slander, the subsequent words that should take off the force of the former, ought to carry a strong intention that they were not spoken in an actionable sense; for it is very unreasonable that one should slander another by general words, and then mitigate them by words of a doubtful interpretation: *Alleyn*, 7. These words in the whole frame are actionable.

The objection to the third set is, that being a married man, he could not commit fornication, which is but saying the speaker mistook the legal name of the offense. It might be a good objection, if Walton were trying on an indictment for fornication. Our inquiry is of a different nature: did the words impute a crime? Fornication, in its general use, signifies all kinds of whoredom. Adultery is fornication of an aggravated nature. In many cases the action will lie, notwithstanding there is a repugnance in the words themselves, or made so by the matter apparent on the record; as if one say of a widow

having children born in wedlock, she is a whore, and her children are bastards. Now, though the children born in wedlock cannot properly be bastards, yet they might be reported as such: Cro. Car. 322.

Thou wast foresworn in carpenter's hall, and robbed the hall, actionable, though properly speaking the hall could not be robbed: Cro. El. 788.

So words spoken by a *feme covert*, you stole my faggots (meaning the faggots of the defendant), adjudged actionable, although it was objected that the defendant, a *feme covert*, could not have any faggots: Palm. 358. It would be a most shocking doctrine, and afford a cover for slander, if the slanderer could escape by such a subterfuge; as if one should say, he committed flat burglary; I saw him go to bed to the wife of A. B.

The cases of charging one with the murder of a man living, not being actionable, because impossible, were not much respected by Lord Holt, who in such case observed the fault is the greater—it is a double crime: Comb. 247.

The rule is now well established that no inconsistency or want of grammatical propriety will prevent words from being actionable, when the intention to charge the party with a crime clearly appears, and when a criminal charge is conveyed by defendant's expression.

The liability to make reparation, cannot be affected by any impropriety in the communication, whether legal or grammatical, when the loss of character, and its probable consequences, constitute the ground of action, though the act charged is in legal strictness impossible: See Stark. 78 to 80.

It is, therefore, the opinion of the court that the declaration contains no faulty count, and that judgment should have been entered for the plaintiff.

The judgment of the district court is therefore reversed, and judgment for the plaintiff.

Judgment reversed, and judgment for the plaintiff.

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## COMMONWEALTH v. GILLESPIE.

[7 SERGEANT & RAWLE, 409.]

PRINCIPAL'S RESPONSIBILITY CRIMINALLY.—A principal is liable criminally for those acts of his agent in which he participated, and such participation may be shown by circumstantial evidence.

**INDICTMENT—SELLING LOTTERY TICKETS.**—A count in an indictment charging the defendant with selling a lottery ticket or tickets in a lottery not authorized by the laws of the commonwealth, is bad for generality; the name of the lottery and the number of tickets should be specified. But a count for conspiring to sell a lottery ticket or tickets in a lottery not authorized by the commonwealth, is good.

**IDEM—DISTINCT OFFENSES IN.**—The joining of several distinct offenses of the same nature in the same indictment, whether in misdemeanor or felony, cannot be objected to on demurrer or in arrest of judgment; but the court may compel the prosecutor to elect in felony on what charge he would proceed.

**IDEM—CHARGING DIFFERENT PERSONS.**—Several persons may be charged in the same indictment for the same act, when it admits of the agency of several. So, also, several persons may be charged in the same indictment, in different counts, for different offenses, though the court may quash such indictment.

**OFFENSE WHERE PUNISHABLE.**—A conspirator may be convicted in the place where the overt act is done, in pursuance of such conspiracy; and one who has procured a misdemeanor to be committed, is guilty in the place where it is committed.

**VARIANCE IN INDICTMENT.**—The variance in spelling a name on a lottery ticket, for the selling of which indictment is found, is fatal.

INDICTMENT, containing nine counts, against D. Gillespie and O. H. Gregory, found in the mayor's court of Philadelphia, and moved to this court by *certiorari*. A lottery ticket was described in one of the counts, setting forth the name of one of the managers as "Jonathan Burrill," whereas, on the ticket produced in evidence, the name was "Jonathan Burrall." The case further appears from the opinion.

*Chauncey and Binney*, for the defendants.

*Biddle and Kittera*, *contra*.

By Court, DUNCAN, J. This indictment consisted of nine counts. The jury have found separate verdicts.

On the first, which was for conspiring to sell lottery tickets, in a lottery not authorized by the laws of this commonwealth, the jury have found the defendants guilty, so far as relates to a ticket. On the second, which was for a conspiracy to advertise, not guilty against both. On the third count against both, for selling lottery tickets not authorized by the laws of this commonwealth, guilty of selling a lottery ticket. On the fourth, for advertising such lottery tickets, not guilty. On the fifth, against Gregory, for selling such lottery tickets, guilty as to one ticket. On the sixth, against Gillespie, for selling such lottery tickets, guilty as to one ticket. On the seventh, for advertising, against Gregory, not guilty. On the eighth, for



advertising, against Gillespie, not guilty. On the ninth, for selling a lottery ticket, set out in words and figures, guilty against both.

The defendants have moved for a new trial, and in arrest of judgment. The motion in arrest of judgment I will first consider. The reasons in arrest of judgment are, that the offense in the third, fifth, and sixth counts is not laid with sufficient certainty; that the offenses could not be laid in the same indictment; that the defendants could not be indicted jointly and severally in the same indictments. I do not think it necessary to set out the ticket or tickets; but the indictment should state what was the name of the lottery and the number of tickets sold, where the charge is for advertising or selling. For the charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offense and the defendant be put on his trial for another, without any authority; so that the court may see a definite offense on record, that they may apply the judgment and the punishment which the law prescribes; and so the defendant's conviction or acquittal may insure his subsequent protection; that he may be enabled to plead it in bar of any subsequent proceedings. The indictment ought to state the fact, with as much certainty as the nature of the crime will admit.

There are cases, consisting of a series of transgressions, which constitute the offense, as being a common scold or bar-rator; keeping a disorderly house, etc., where it must be charged generally. An indictment for fishing in a fishery, and taking away divers fish, was bad at common law; *Key v. Marshal*, 2 Keb. 594. For it is material that the defendant should be apprised of the charge against him, in order to prepare for his defense; and it is clear that an indictment for stealing divers fish, not specifying the number, would be insufficient: *Pealey on Convictions*, 82. An indictment for engrossing a great quantity of straw and hay, without mentioning the quantity, quashed for uncertainty: *Cro. Car.* 380; *King v. Gibbs*, 1 Stra. 497. Indictment for selling divers quantities of beer in unlawful measures, is too general, for a court cannot form a judgment in what degree to punish the defendant. In trespass, the number and nature of things ought to be mentioned: *Playter's case*, 5 Rep. 34.

A conviction on Stat. 43, El. c. 7, for cutting down divers

lime trees, quashed for uncertainty, the number not being set out: *Queen v. Burnaby*, 2 Ld. Raym. 900. In trespass for taking divers goods, not saying what goods, judgment arrested after verdict, for uncertainty in not specifying what the goods were, so that the recovery could not be pleaded in bar of another action brought for the same goods: *Wiat v. Essington*, 2 Ld. Raym. 1410; and see 2 Saund. notes, 310. The third, fifth and sixth counts, cannot be supported, and judgment on them must be arrested. In *Stewart v. The Commonwealth*, a judgment on an indictment for stealing sundry promissory notes, for the payment of money of the value of eighty dollars, of the goods and chattels of A., was reversed for the vagueness and uncertainty: 4 Serg. & B. 194. But the same reason does not apply to the first count, for the conspiracy itself is a crime.

It is different from an indictment for stealing, or action for trespass, where the offense consists of an act done, which it is clearly in the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell; not of any particular prohibited lottery, but of all. The conspiracy was the *gravamen*, the gist of the offense. These several charges, as laid in the indictment, are different modes of laying the same offense. But if the offenses were different, separate offenses, it is no objection, either on demurrer or in arrest of judgment, that separate offenses of the same nature are joined against the same defendant.

Even in case of felony, though it be true, that no more than one offense should regularly be charged, in one indictment, and that the court would quash the indictment before plea, or if on the trial, the court should think it might confound the prisoner, they may exercise a discretion in compelling the prosecutor to elect on which charge he will proceed, yet, even in felonies, there is no objection to the insertion of several distinct offenses of the same degree, though committed at different times, in the same indictment against the same offender; and it is no ground of demurrer, or in arrest of judgment, and counts, where offenses of the same nature, counts at common law, and on statute, may be joined: 1 Chitty. C. L. 175. In misdemeanor, no objection can be made to joining several in the same indictment for the same act. For though torts are in their nature several, and each one must answer for his own independent crime, yet, when the act admits of the agency of several, as assault and battery, or libel, they may be indicted jointly or severally. Not so of perjury, because the assignment must be of

the very words uttered, and the words of one cannot be applied to another; or where the criminality arises in consequence of some personal disqualification; as for exercising a trade, not having served a due apprenticeship. Nor to the objection maintained, that several persons could not be severally indicted in the same bill for separate offenses. For though it might be in the discretion of the court to quash such indictment, yet it cannot be taken advantage of in arrest of judgment. For they are considered as several indictments in point of law. *Ld. Hale*, 2 H. H. P. C. 174, says: "It is in common experience of this day, that twenty persons may be indicted for keeping disorderly houses, and they are duly convicted on such indictments; for the word '*separabile*' makes the several indictments." The first and ninth counts are good counts, and judgment should be rendered on them.

But there is a motion for a new trial on the first, as being a verdict against evidence, and on the ninth on account of the variance between the ticket described in the indictment and that given in evidence.

The evidence was, that a lottery-office was kept in a house rented by Gillespie in this city, for several years, under a sign in the name of Gillespie's lottery-office; that Gregory, a young lad, acted as his servant or agent in that office, and sold the ticket produced in evidence, a New York literature lottery-ticket, and indorsed in the name of Gillespie; a lottery not authorized by the laws of this commonwealth; that Gillespie occasionally visited Philadelphia.

I did not instruct the jury that Gillespie was criminally answerable for the act of his agent or servant, but I left them to decide whether, from the whole body of the evidence, Gillespie was concerned in the sale of this ticket.

The house his; the boy conducting business for him as a lottery-broker, under his sign; selling this very ticket as his agent, and in his name. These were circumstances from which the jury might infer his participation in the sale of this ticket, more especially as, if the boy had been employed as his agent to sell tickets authorized by the laws of this state, and not tickets prohibited, a production of his books would establish his innocence. That criminality, even in acts of the blackest dye, might be made out by circumstantial evidence. I put to the jury as examples, libels sold by a child in the shop of a printer; tippling-houses, liquor sold by a boy; bawdy-houses, where the keeper kept out of view herself, though she was the

owner of the house; and I did put it to the jury as a case in which the *evidentia rei*, the *res ipsa loquitar*, might afford satisfactory evidence of the participation of Gillespie.

But it was for them to draw their own conclusions of participation or not. If they found he had not participated in the transaction, they were instructed to acquit both, as to the indictment for conspiracy, if otherwise, to convict. They have been convicted, and to my entire satisfaction. For the law would be a dead letter; we would become the laughing stock of our sister states; either for the inaccuracy and little foresight of our law-makers, or for the imbecility of those employed in the administration, if such a procedure as this was not brought within the law, if our neighbors from New York or Baltimore, could levy a revenue in this state, by the employment of a child or a slave. It makes no difference where Gillespie resided, if he conspired to sell New York lottery tickets in Pennsylvania, with his agent, and the agent effected the act, the object of unlawful conspiracy, he is answerable criminally to our laws. In this offense there is no accessory. It must be recollected the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place; and if the parties are linked in one community of design, and of interest, there can be no reason why both may not be tried, where one distinct overt act is committed. For he who procures another to commit a misdemeanor, is guilty of the fact, in whatever place it is committed by the procuree. For if Gillespie was not accountable to our laws, then this offense would, within our state, be committed by him with impunity. For that consequence must follow, from its being held to be no crime in him, residing in New York, to procure the selling of lottery tickets in Pennsylvania, and the argument must rest on the position, that he owed no obedience to these laws, and had been guilty of no offense in contravening them.

This count was not abandoned on the trial on the part of the state. I do not precisely recollect, whether the gentlemen who conducted the prosecution, in stating the testimony, applied it to each count. Nor was there any occasion for this, for it equally went to prove every count in the indictment, as it did to any one. But I well recollect, there was an address to the court on the insufficiency of this count. I am of opinion, and in this, every member of the court agrees, that the verdict was not contrary to the evidence.

On the variance between the tickets described in the ninth count, and the ticket given in evidence, on very full consideration, I am of opinion I decided erroneously. I was led into error by not discriminating sufficiently between allegations of description and those of substance, between pleas of abatement and questions of identity, and matters of literal description, and confess I was carried away by the *idem sonans*, by the sound, as I must say, rather than by the real substance of the rule. Where the prosecutor has undertaken to set out the lottery ticket, *literatim*, in the words and figures following, this imports a tenor, a transcript, and implies the very same. Where a letter, omitted or changed, makes another word, though it be insensible, the variance is fatal: *Queen v. Drake*, 1 Salk. 660. The case of *Williams v. Ogle*, 2 Str. 889, is the only case to be found, where on *nul tiel record*, the change of a letter in a name, which did not alter the sound, as Segrave and Seagrave, was not held to be a fatal variance: 2 Str. 889. But it is but a short statement of three lines, and the reporter adds a *quare tamen*, where the party has something else to go by than the sound.

It is true, Chitty, in his Criminal Law, 1 Chitty, 284, gives credit to this case, which the reporter himself had discredited. The sound in names is what governs the cases of pleas of misnomer, questions of identity; there it does not depend on the omission of a letter making another word, but another sound; for I think it has been determined that in these cases Shakespeare, Shackspeare, are the same, because *idem sonans*. But if you omit the s in the middle, and give it another sound, there is a failure, as Shakespeare. Burrall, Burrill, Burrell, are certainly *idem sonans*, and so is Burwell, but I do not suppose that in an indictment for forgery, setting out the instrument *in hæc verba*, that stating it to import to have been given by Burrill, would be supported by a paper signed Burwell; now the *idem sonans* must hold in every case of description, or there is nothing in it. Would it do in Leigh and Lee, Caldecleugh and Calclew, Duncan and Dunkin? Would it do in Tallifer for Taliafero, Chumley for Cholmondely? Sound may be the substance of a name, and when it is a matter of substance it might hold, like any other allegations of substance; but sound is not a matter *verbatim et literatim*. A name is a word, and in undertaking to set out the name *literatim* it was not a *vox et pretereantia*. Different letters will make different names, though the sound be the same. The word would then be a different word,

another word; which in all cases of description, makes the variance fatal. Had this been set out in the manner following, the variance would not have been fatal; but when the phrase by legal intendment professes an exact recital, as here in the words and figures following, all the cases seem to require a literal precision, unless where it does not change one word for another.

The verdict on the last count ought not to stand, but on the attorney-general entering a *nolle prosequi* on that count, I can see no difficulty in entering judgment on the first count, as the verdict is separate. I see nothing to prevent a *nolle prosequi* on the ninth, at any time before judgment, for the ticket was proper evidence on that count. There is nothing in the objection, as it relates to the uncertainty in the verdict. The verdict, in making up the record, would stand, that the defendants and each of them were guilty in manner and form, as they stood indicted on each count.

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### STOOPS v. COMMONWEALTH.

[7 BURGESS & RAWLE, 491.]

CONVICTION OF ACCESSORY IN FELONY.—Where one is charged as accessory to a felony committed by several persons, some of whom are not proceeded against to conviction or outlawry, he may be arraigned and tried as accessory to such as have been convicted; but if he be tried, convicted and sentenced as accessory to all, without his consent, it is error.

IN ERROR. Indictment against the plaintiffs in error as accessories before and after the fact to the crime of burglary, committed by several persons. The plaintiffs in error were found guilty as accessories to some of the principals who, it appeared, had not been tried or arraigned.

The case is stated in the opinion.

*King*, for the plaintiffs in error.

*Kittera*, contra.

By Court, DUNCAN, J. Charles Loring, James Mitchell, Charles A. Mitchell, Filatio Russel, Solomon Price, Adam Stoops and — Cook were indicted for burglary, and Margaret Stoops and Ann Carson, plaintiffs in error, with Elizabeth Mitchell and Henry Parmele were indicted as accessories before and after the fact, to all the principals. Loring and Russel pleaded guilty; James Mitchell and Charles A. Mitchell not guilty. Price, Stoops and Cook were never tried or arraigned. The

plaintiffs in error were afterwards tried as accessories. Margaret Stoops was convicted as accessory both before and after. Ann Carson as being accessory after. Elizabeth Mitchell and Henry Parmale were acquitted.

The errors assigned are: 1. That accessories were tried and convicted before conviction of all the principals; 2. They were tried as accessories of principals who had neither been outlawed, arraigned, or convicted; 3. The indictment charges two felonies, and the plaintiffs in error were charged as accessories to the felony aforesaid.

The offense of the accessory, though different from that of the principal, is yet, in judgment of law, connected with it, and cannot subsist without it. In consequence of this connection, the accessory shall not, without his own consent, be brought to trial, till the guilt of the principal is legally ascertained by the conviction or outlawry of him, unless they are tried together, and then the jury shall be charged to inquire first of the principal, and if they are satisfied of his guilt, then of the accessory: Foster's Cr. L. 361. As the law formerly stood, if a man had been accessory in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted or outlawed; but as the law now stands, if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon it: 9 Co. 119; and the court, in their discretion, may arraign him, as accessory to such of the principals who are convicted, and if he be found guilty as accessory to them or any of them, judgment shall pass upon him. But on the other hand, if he be acquitted, that acquittal will not discharge him as accessory to the others. And when they come in and are convicted and attainted, or judgment of outlawry passes against them, he may be arraigned *de novo* as accessory to them: 1 Hale, 624; and he may be considered as accessory to him who has been convicted, though the evidence prove him to have stood in that relation of guilt to several. It is said by Lord Hale to be the safer course, to postpone the arraignment of the accessory till all appear or are outlawed.

Now there cannot appear to be justice in trying a man as accessory to several, some of whom have been convicted, and others neither convicted nor outlawed; and that if he be acquitted on that trial, he should still be subject to a future trial on the conviction or outlawry of the others. The verdict here finds the prisoners guilty as accessory to all. The jury could

not inquire into the guilt of those who had not pleaded, and yet they find them guilty as to these. The prisoners might properly have been arraigned and tried with the principals who had pleaded, but could not without their consent be put to plead on the whole indictment as to those who were not on their trial, and had neither been convicted nor outlawed; and the only question is, do the arraignment and plea amount to a consent to be tried as accessories to all?

In a case so highly criminal, a silent submission probably arising from ignorance, at the time, of the right, ought not to be construed into a relinquishment of the right, and a consent to the proceedings as they took place. In *The Commonwealth v. Andrews*, 3 Mass. 126 [3 Am. Dec. 17], it was held not to be a waiver of the right, and the reason is much stronger why consent should not be implied in this case, where it exposed the parties to a double trial for the same offense, a matter prohibited by the constitution.

There is an insuperable difficulty where none of the principals are taken or convicted in every other part of this State than the courts of Philadelphia. For, as there can be no removal by *certiorari* into the supreme court of any indictment, and as there could be no trial there, did the party come in and plead, so there can be no outlawry. This can only be remedied by the legislature, in taking away all original jurisdiction from the supreme court, except in the city and county.

This case of outlawry is not provided for, but the court cannot supply the omission, and deprive the accused of a privilege which the common law has conferred on him. It appears to the court that there was a mistrial, and the judgment, for that reason, must be reversed. But the court order and direct that the prisoners enter into recognizance, each in two thousand dollars, with one or more sureties, for their appearance at the next court of oyer and terminer, to be held by the court of quarter sessions for the county of Philadelphia, to answer for this offense.

The court do not think it proper to pass over in silence the last objection, which is to the indictment. This objection would have been sustained had two felonies been charged against the principal. The allegation of the prisoners being accessory to the felony aforesaid, when there were two distinct felonies against the principal, would have been defective, and have vitiated the indictment against the accessories. But there is only one offense laid, and that, this burglary. The charge is



for burglarious entry, with intent to steal, and then and there stealing. It is all one offense, one burglary. The only crime laid is burglary.

GIBSON, J., was absent.

Judgment reversed.

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### STEPHENS v. GRAHAM.

[7 SHERBURN & RAWL, 805.]

**ALTERATION OF DATE OF NOTE.**—A promissory note, the date of which has been altered without the consent of the indorser, is thereby rendered void, though in the hands of an innocent indorsee.

**ERROR.** Action by the indorsee against the indorser of a promissory note, the date of which had been altered. The verdict was given for the plaintiff.

The facts further appear from the opinion.

*Kemble*, for the plaintiff in error.

*Lowber*, *contra*.

By Court, DUNCAN, J. The defendants in error, plaintiffs below, declared on a promissory note for one hundred and fifty dollars, payable six months after date, drawn by one John Grant, and made payable to Benjamin Stephens, who indorsed it to the plaintiffs below, and dated on the twenty-sixth July, 1814. The date was evidently altered; but whether the alteration was from the twenty-first or the twenty-fifth, was not fully in proof. The direction of the court was a very special one.

It is contended by the defendants in error that the alteration of the date from the twenty-fifth to the twenty-sixth is altogether immaterial, as it becomes due on Sunday; and by the custom of merchants in this city, such note would be considered as payable on the Saturday preceding; so that whether payable on the Saturday or Sunday, the days of grace would be the same, and no injury done. The effect of an alteration of all written instruments is the same. All that are altered or erased in a material part, without the parties' consent, are vitiated: *Master v. Miller*, 4 T. R. 320; and 1 Anstruther, 225, in the Exchequer Chamber. The contrary opinion of Judge Buller, as to the difference between deeds and other writings, was opposed by all the other judges of Westminster Hall. Negotiable paper, which passes from hand to hand, was considered by eleven judges to require greater nicety and circumspection.

than bonds, which are generally confined to the custody of one person.

It cannot be said that the date forms no part of the bill, nor that it forms an immaterial part. If it were not a material part, the note might not be destroyed, according to *Trapp v. Spearman*, 1 Esp. 57. It does not depend on the accelerating or extending the day of payment, or increasing or decreasing the sum, but upon the identity; to insure the identity, and prevent the substitution of one instrument for another (*Sanderson v. Lymond*, 1 Brod. & Bing. 134) is the foundation of the rule; and it is a wise rule, as it prevents all tampering with written instruments. For though the alteration is an obligation from pounds into dollars, from sterling pounds into current pounds, although such alteration could not to any possible extent injure the obligor, still it avoids the bond. So if the sum were lessened.

The day on which this note became due, in point of law, was six months after date. The custom of demanding it on Saturday, when it becomes due on Sunday, has relation to the days of grace, and not to the legal day of payment. The days of grace are gratuitous only, in contemplation of law, though the course of usance at particular places will be taken notice of by the court. But this would not affect the statute of limitations. When would the time begin to run? Certainly from the day on which, by its terms, it became due. Like the time of grace allowed by courts for special bail to surrender their principal. At law, the party is bound, and could not take advantage of a surrender after the return of a *capias ad satisfaciendum* by pleading. It is by motion to the court.

The cases which have been relied on by the defendants are, where the addition was, most probably, not written under the acceptance, but a memorandum afterwards where to find the acceptor, where the bill became due, and no part of the acceptance. If this were not so, according to the opinion of the court in *Tidmarsh v. Grover*, 1 Mau. & Selw. 735, they were wrongly decided. The date of the instrument ought to be clearly expressed. If it has no date, then the time will be computed from the day on which it issued: Chitty on Bills, 43. The day of the date is excluded in the computation of a bill payable after date: Chitty, 138. The best and safest is a general rule that where a bill is altered in any material respect, as for instance, the date or sum, without consent of the drawer, it will discharge him, although the bill afterwards come into the hands of an innocent indorsee not aware of the change: Chitty,

62. But what removes every doubt is, that it is laid in the declaration as given on the twenty-sixth, and in every written instrument, the day laid is material, and must be proved as laid, where the action is brought on the instrument itself; not where laid under a *videlicet*, and the action is not founded on the writing: 2 Peake, 196.

Now, here the allegation is that the note was given on the twenty-sixth. Proof that it was given on the twenty-first or twenty-fifth would have been a material variance, and such the defendants in error admitted their case to be. It is not the identical note the party has given. The note here is the only medium by which the plaintiffs could recover. It is through that they derive a right of action. The question is whether or not the defendant below promised in the form stated in the declaration, and the substance of his plea is, that according to that form he is not bound to pay.

I regret much the necessity of reversing this judgment, because we see that from the opinion of the jury the question was altogether immaterial, as they found that the alteration was made with the privity of the defendant. Had this been, or could the court have put it into the shape of a special verdict, which I have struggled to do, all would be right; but I fear the danger of innovation in favorable cases, and of receiving an opinion of a jury attached to a general verdict as a foundation for converting it into a special verdict. There was therefore error in that part of the opinion of the court directing the jury to find for the plaintiffs, if they found the alteration to be from the twenty-fifth to the twenty-sixth, if in their opinion it was immaterial. It was a question of law, and in my opinion was such an alteration as, if done without the consent of the drawer, avoided the note; but at all events, as the note was set out as dated on the twenty-sixth, proof of its being on the twenty-first or twenty-fifth, did not support the declaration.

Judgment reversed, and a *venire facias de novo* awarded.

CASES  
IN THE  
COURT OF APPEALS  
OF  
VIRGINIA.

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SLAUGHTER *v.* GREEN.

[1 RANDOLPH, 2.]

**LIABILITY OF MILLER AS BAILER.**—Wheat was delivered to a miller, upon an agreement that he should return a given quantity of flour for so many bushels of wheat. It was held the miller was liable as a bailee, and was not a purchaser; and therefore if the wheat be destroyed by accidental fire, he will not be held responsible; and this notwithstanding the miller is not bound to return flour made from the identical wheat, but flour of a certain quality.

**ACTION** against the owners of a certain mill for the value of one hundred and twenty bushels of wheat, delivered to them under an agreement, to be ground, and to return one barrel of superfine flour for every five bushels of the said wheat. The defendants pleaded in bar the destruction of the said wheat by accidental fire. Judgment for defendants, from which an appeal was taken to this court.

*Leigh*, for appellant.

*W. Hay, jun.*, *contra*.

By Court,\* **ROANE, J.** The court is of opinion that although wheat may be exchanged for flour, as well as sold for money, so as to operate a transmutation of property in it, from the vendor to the vendee, it may also be the subject of bailment, both for the mere purpose of safe keeping, and for that of being converted into flour for the use of the bailor. A bailment of this last kind is called, in the books, *locatio operis faciendi*, and

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\*The court was at this time composed of Judge Fleming, president, who was absent during this period from sickness; and Brooke, Cabell, and Coalter, JJ. Judge Roane died fourth September, 1822, and John W. Green was appointed to fill the vacancy, taking his seat eleventh of October, 1822.

undeniably exists in the case of a single bailment, and where the flour of the *same* wheat is to be received in return. But the character of the transaction is not lost, when for general convenience, the wheat delivered at a mill, by many customers, is agreed by a common usage, or otherwise, to be put into a common stock, and when it is further agreed that the return is to be made out of the common mass of flour.

These variations from the doctrine of a simple and individual bailment, whereby each bailor was to receive the identical proceeds of his own wheat, it was competent for a numerous class of bailors to make, without changing the character of the transaction. It may still be considered as a simple and individual bailment of the wheat, accompanied by an agreement of all the parties (the bailees themselves not excepted), that for general convenience, these conditions should be superadded. They are conditions which impose no hardship on the bailee, but on the contrary, are inserted for his accommodation and convenience; and in relation to the bailors, it is probable that without them the wheat would have been received.

While the convenience of the bailee is consulted thereby, as aforesaid, it is not seen that any loss or injury will arise to the bailors therefrom. On the contrary, the wheat deposited by all the other bailors may have been better than that of the appellant in the case before us; and, if so, the custom in question would conduce to his benefit. At any rate, the parties to the contract had power to agree to these conditions; and they do not change the character of the transaction. They do not convert a bailment of the kind mentioned into a sale or an exchange of the wheat for flour.

By the terms of this custom this wheat is "to be ground" into flour, and when so ground, is to be "returned" to the farmers collectively taken. These circumstances completely negative the idea of a sale or exchange of the wheat, which would carry with it the transmutation of property. The property in the wheat is certainly not conveyed to the millers, when they could not sell the wheat in specie, without violating their contract, which is to grind it into flour; nor even to sell the flour itself without, in like manner, violating their agreement to return it to the several bailors. That is a curious kind of ownership, in which the party has no absolute power over the subject, either in its original state, or after it has been manufactured. The millers in this case, have the absolute ownership of nothing, but the excess of the flour which may remain

to them, after returning the stipulated quantity to the several farmers. This constitutes their profit in the contract, and over this portion of the subject, alone have they the absolute right of property. That right as to the residue, remains in the farmers, and has never been surrendered by them. These two circumstances, so utterly incompatible with the idea of a right of property in the millers, in the wheat or flour in controversy, conclude that question as at the time of the contract. At that time they estopped the appellees from claiming the wheat as their wheat. The millers, by their receipts given at the time, even expressly say, that the wheat is received "to be ground," which excludes the idea of an absolute ownership of the wheat itself. The construction arising out of these receipts, being the act of both the parties to the contract, at the time, outweighs a seeming exposition of the contract, by the appellees only, at a future time, in relation to the wheat of Sterne.

This wheat, then, remaining the property of the bailors, and being accidentally burned by fire, the loss must be borne by them. It must be so borne, because, however, it might be under other circumstances, it is expressly found, that there was in the mill, at the time of the fire, flour, etc., enough to satisfy all the claims upon the mill, for the same. Thereafter, it was the fault of the appellant, that his portion of it was not demanded, and taken away. He shall therefore bear the loss. It is even stronger than the case put in 1 Bacon, 554, where it is held, that if A. deliver goods to B., a carrier, to be carried from C. to D., and then forwarded to E., and B. carries them to D., and puts them in his warehouse, in which they are destroyed by fire, before an opportunity offered to forward them to E., B. was adjudged not liable. In this case, if the appellant had not neglected to call for the flour, after it was ready, the loss in question would not have happened. We are all, therefore, of opinion, to affirm the judgment.

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Sir William Jones, who has been called "the great oracle of the law" upon the subject of bailments, points out very clearly the distinction between such a delivery of goods as constitutes a sale of them, and a mere bailment: Jones on Bailments, 105, 106. He shows that if the goods delivered are to be returned, although in a changed form, it is simply a bailment, and the property in them remains in the bailor, but if the intention is that either money or other goods are to be received in exchange for them, there is a transmutation of property, and the obligation created is a debt and not a bailment. The principal case lies so close to the line separating bailments from sales as to have occasioned doubt in the minds of some as to the class to which it belonged. Some of the decisions on this subject have viewed this as a parallel case to that of *Seymour v. Brown*, 19 Johns. 44, where wheat was delivered

at a mill upon an agreement to receive flour in exchange, at the rate of one barrel for every five bushels, and the court held it to be a bailment, *locatio operis faciendi*, which did not change the property in the wheat so that upon its destruction before the flour was delivered the loss fell upon the bailor; a decision which has been repeatedly overruled: *Hurd v. West*, 7 Cow. 752; *Smith v. Clark*, 21 Wend. 83; *Norton v. Woodruff*, 2 N. Y. 153; *Mallory v. Willis*, 4 Id. 77; *Pierce v. Schenck*, 3 Hill, 28; *Ewing v. French*, 1 Blackf. 353, 355; *Busfum v. Merry*, 3 Mason, 478. In one of these cases: *Smith v. Clark*, 21 Wend. 83, it was held that where wheat was delivered for a certain quantity of flour, to be returned, the transaction was a sale and not a bailment, and Bronson, J., delivering the opinion of the court, said: "A different doctrine was laid down in *Seymour v. Brown*, 19 Johns. 44, but the authority of that case has often been questioned: 2 Kent, 589; Story on Bailments, 193, 194, 285; *Busfum v. Merry*, 3 Mason, 478; and the decision was virtually overruled in *Hurd v. West*, 7 Cow. 752, and see p. 756, note. The case of *Slaughter v. Green*, 1 Rand. 3, is much like *Seymour v. Brown*. They were both hard cases, and have made bad precedents."

It is shown, however, in *Chase v. Washburn*, 1 Ohio St. 251, that the principal case is not at all parallel with that of *Seymour v. Brown*, and that its circumstances bring it clearly within the rule laid down by Sir William Jones. The court say: "The case of *Slaughter v. Green*, 1 Rand. 3, and also the case of *Inglebright v. Hammond*, 19 Ohio, 337, are relied upon as sustaining the plaintiffs in error. These two cases, on examination, do not sustain the doctrine of the case of *Seymour v. Brown*, above referred to, in 19 Johns. On the contrary, instead of an exchange of wheat for flour, in each of the cases, by the express terms of the contract, the flour to be returned was to be manufactured out of the wheat furnished. In the former case the written receipt given for the wheat expressly provided, 'that it is received to be ground,' which excludes the idea of passing the ownership to the miller."

A case similar in its features to this, was *Baker v. Roberts*, 8 Greenleaf, 101, where the agreement was that certain logs delivered were to be manufactured into boards, which were to be sold by the manufacturer upon commission, and this was held to be a *locatio operis faciendi*. In *Mallory v. Willis*, 4 N. Y. 77, the rule was said to be that if logs are delivered to be manufactured into lumber, which is to be divided between the parties, this is no sale, but a bailment; but if lumber, generally, is to be returned in exchange, it is a sale. Another class of cases is where goods are delivered to be returned in kind but not specifically. Of this class is *Fosdick v. Greene*, 27 Ohio St. 484: S. C., 22 Am. Rep. 328, where a number of shares of certain railroad stock were delivered to be returned on demand, and it was held that this was a *mutuum*, and that the obligation was satisfied by returning other shares of the same stock.

## WILSON v. SPENCER.

[1 RANDOLPH, 76.]

**CONTRACTS IN VIOLATION OF LAW.**—A contract founded on an act forbidden by statute, under penalty, is void, although not expressly declared to be so, and no action lies to enforce it.

**REPEAL OF STATUTE.**—An important public statute of long standing will not be held to be repealed, except by express words or by strong and necessary implication.

DEBT originally brought against Wilson and Neale by Spencer on a note under seal. The defendants filed two special pleas, stating in substance that the note on which the action was brought, was given to the president of an unchartered bank, established contrary to the provisions of the statutes, and was given in violation of law. The plaintiff demurred, and there was a joinder thereon. The county court gave judgment for the plaintiff, which the superior court affirmed, whence the appeal was taken.

*W. Hay, jun.*, for appellants, cited *Bartlett v. Viner*, Carth. 252; *Drury v. Defontaine*, 1 Taunt. 136; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 Id. 456; *Weymel v. Read*, 5 Id. 599; *Nerot v. Wallace*, 3 Id. 17; *Lightfoot v. Tennant*, 1 Bos. & P. 552; *Ribbons v. Cricket*, Id. 264; *Parkin v. Dick*, 11 East, 501; *Hunt v. Knickerbocker*, 5 Johns. 320.

*Leigh, contra.*

By Court, ROANE, J. It is not easy for this court to perceive on what grounds this judgment can be justified. Although the act of February 24, 1816, was not in force when this bill was given, the act of 1805 was, and the bill was given for a consideration utterly prohibited by that act. It was given for a consideration prohibited under severe penalties; and the cases cited for the appellant incontestably prove that any contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so; and that no action lies to enforce it. Whatever might be said in relation to an action brought to recover the amount of the bank notes, given as the consideration of this bill in favor of the holder against the bank, in favor, as might be argued, of an innocent indorsee, or holder of the said notes; it is clear that no action will lie on a bond given to secure the payment thereof, in favor of the bank, the party more emphatically offending against the policy of the act. It is this last-mentioned party who is now asking the court to give its aid to violate the provisions of an act of great public policy and utility. There can be no ground for such a pretension, unless we consider the act of 1805 as repealed at the time, and as having no binding force or authority. In relation to a law of this importance and character, and of such long standing in our code, we ought not lightly to imply such a repeal. It should be shown to be repealed, either expressly or by a strong and necessary implication. The only ground on which that inference is attempted to be supported



in this case arises from the suspension of the act of February 24, 1816. That act was additional to that of 1805, and created further penalties and forfeitures for its infraction; but it left the act of 1805 in full force.

In making a further declaration, in the act of 1816, that notes, bills, etc., issued contrary to its provisions, should be null and void, it cannot be inferred that those made contrary to the act of 1805 are valid. The suspension of the former act does not necessarily carry with it the repeal or suspension of the latter; nor did a particular provision of the act of 1816, sec. 7, specially prohibiting suits, by the banks therein contemplated, interfere with similar prohibitions, resulting on general principles of law, from the inhibitions contained in the act of 1805. A suspension of the act of 1816, therefore, did not suspend, repeal or interfere with, the provisions of the act of 1805, nor does a recognition contained in the suspending act, of a right in the banks therein mentioned, to close their transactions in conformity with the provisions of the act of 1816, annul or apply to the prohibitions contained in the act of 1805. That suspension left the banks aforesaid on the ground they occupied before the passage of the act suspended, but did not place them in a better situation; and, far less, as was argued, did it legalize and charter those associations. It left those banks free to arrange their matters, if they could, without suit, and unaffected by the severe and additional restraints and penalties of the act of 1816. It did not mean to interfere with the original act, when it only purported to suspend in part another act, more effectually to suppress the circulation of notes emitted by unchartered banks. The suspension only operated up to the point embraced by the last act, and did not go beyond it.

Under the admission that the prohibition in the act of 1805 is not repealed, the counsel for the appellee concedes, that in regard to individual cases, the law would be decided against him; but he claims an exemption for his clients on the ground of the extent of this confederacy to infringe the laws, and of what he is pleased to call a disease of the body politic. There may be cases in which the still voice of the law may not be heard, nor the power of the civil officer be competent to execute its judgments. That, however, is an extreme case, partakes of the nature of a revolution, and, in point of magnitude, is not shown to exist in the case before us. But where would gentlemen draw the line in such cases? We know of no such boundary in the case before us. All that we know is, that certain

associations of individuals have set themselves up in open violation of the laws to exercise a high function of sovereignty, at most, only confided to the power of the legislature.

We are, therefore, unanimously of opinion that the judgment, in this case, is erroneous, and that it should be reversed, and entered for the appellants.

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## BURWELL v. CORBIN.

[1 RANDOLPH, 131.]

**PROOF OF WILL, SUFFICIENCY OF.**—Where it appeared by a special verdict that one of the witnesses to a will saw the testator's name signed to the will by a third person, in the presence and by the direction of the testator, but did not hear the testator acknowledge it as his will, and that the other witness subscribed the will on the next day, and heard the testator say it was his will, without expressly acknowledging the signature, it was held that the will was not duly proved as a will of realty.

**ACKNOWLEDGMENT OF SIGNATURE.**—Where a testator acknowledges his signature to a will in the presence of the witness, it is equivalent to signing in his presence.

**SUIT** by the heirs at law of James B. Burwell, deceased against John R. F. Corbin, Thomas Smith and Francis Smith, devisees and legatees under a pretended will of the said Burwell, which had been admitted to probate, and upon which letters of administration had been granted to the said Corbin, to have the said probate set aside on the ground that the said pretended will was feigned and counterfeit, and that the witnesses by whom it was said to be proved were perjured, etc. Upon the filing of the answers of the defendants, an issue was directed out of chancery to the superior court of Caroline county, for the verdict of a jury as to whether the paper-writing under which the defendants claimed was the last will and testament of the said Burwell. The jury being unable to agree upon a general verdict, it was stipulated that they might find the facts specially for the opinion of the court. The jury accordingly returned a special verdict, showing substantially the following state of facts: That on the second day of September, 1811, which was the day of the date of the said paper purporting to be the will of the said James B. Burwell, the said Burwell requested one of the subscribing witnesses, Thomas I. Scrimger, to call at his house, saying that he had particular business with him; that the said Scrimger was prevented from attending until the next day, when he went to the said Burwell's house, and

there found the said James B. Burwell, and John B. F. Corbin, defendant, together; when after the said Scrimger had spoken to the said Burwell and Corbin, the said Burwell gave a paper-writing to the said Corbin, and requested him to hand it to the said Scrimger, that he might sign it as a witness; that the said Corbin took the said paper-writing, and observed to the said Burwell that he had not signed it himself, when the said Burwell observed, "aye, you can sign it for me," whereupon the said Corbin, in the presence of the said Burwell, signed the name of the said James B. Burwell to the said paper-writing, and then delivered the said paper writing to the said Thomas I. Scrimger, who, in the presence of the said Burwell, signed his name to the said paper-writing as a witness; that the said paper-writing was then delivered by the said Corbin to the said Burwell, who put it in his pocket; that the said Thomas I. Scrimger, when he returned the said paper-writing to the said Corbin, in a low voice, in the presence of the said Burwell, asked the said Corbin if that paper was the said Burwell's will, when the said Corbin answered that it was; but the witness did not know that this inquiry and answer was heard by Burwell; that the said Thomas I. Scrimger, at the time of his signing the said paper-writing as a witness, inquired in the presence of the said Burwell if there was to be no other witness, when the said Corbin answered in the presence of said Burwell that David Barrick had been sent for, but was not at home," etc.; that on the morning of the fourth of September, 1811, the said Barrick, who was the other subscribing witness, having returned home, went to Burwell's house, "and found the said James B. Burwell sitting on the bed with the said paper-writing in his hand, when the said James B. Burwell asked him to sign that paper, and the said David Barrick thereupon signed his name to the said paper-writing as a witness, in the presence of the said James B. Burwell; that the said Barrick then asked the said Burwell what it was that he had signed, and the said Burwell replied, 'it is my will, but you need not make a talk of it; it is time enough;' and that the said paper-writing, so attested or signed by the said Scrimger and Barrick, is the same which was admitted to record in the county court of Richmond, on the fourth day of November, 1811, which is referred to in the proceedings and issue in this cause; and that the said James B. Burwell, at the time of the attestation of the said paper-writing by the said Scrimger and Barrick, was of sound mind and disposing memory." The jury further found

that if in the opinion of the court these facts showed this to be a valid execution of the said paper-writing as a will of real estate in accordance with the provisions of the statute, then that the same was the last will and testament of the said James B. Burwell, so far as it affected his real estate, otherwise not.

This verdict was duly certified to the court of chancery, together with the opinion of the superior court, to the effect that upon the facts found the will was duly executed. The court of chancery was also of opinion that upon these facts the said paper-writing was the last will and testament of James B. Burwell, deceased, and accordingly dismissed the bill; whereupon the complainants obtained a *supersedeas* from this court, assigning sundry errors in their petition, among which were the following: 1. Because at the trial of the issue of *devisavit vel non*, the deposition of one William Ball was rejected, it appearing in the bill that he was named as the next friend of the infant defendants, which the court thought disqualified him on the ground of interest, to which ruling the plaintiffs took exceptions, for the reason that it was stated in evidence by the counsel who drew the bill that he inserted Ball's name as next friend without his authority, and so far as the counsel, without his knowledge, and that there was no proof that Ball was ever apprised that his name was so used; 2. Because the bill was not duly executed.

*Leigh and Wickham*, for the appellants.

*Tucker, Stanard and Call*, for the appellees.

COALTER, J. It would be unnecessary in this case, to decide whether the deposition of Ball was properly rejected, if the court was unanimously of opinion that this will, on the merits, could not be supported as a good will of lands. This, however, not being the case, it becomes necessary for me, at least to express my doubts as to the correctness of that decision.

I think it clear that if a man's name is used as next friend to infants, without his knowledge or consent at any time given, he is not answerable for costs, and if not so answerable, and in no other way interested, that he is a good witness. The improper conduct of adult plaintiffs, or their counsel, in prosecuting a suit in this way, jointly with infants, cannot prejudice the latter, nor subject the next friend, without his assent, to the payment of costs.

There is no proof in the cause, that the witness even knew that his name had been used as next friend; on the contrary, it

is in proof, that when it was first so used, he was ignorant of it. It does not appear that he ever paid fees to counsel, attended to take depositions, or took any part in the business. It is said, he was probably so named in the commissions; but this does not appear; on the contrary, the caption of his deposition recites a commission in a suit between "Burwell and others, and Corbin and others;" and in another deposition, taken before the same justices, the caption recites the names of the parties, without naming Ball as next friend. Had he been so named in the commission by which his deposition was taken, it is strange that neither the justices nor the parties should have adverted to the extraordinary fact of one of the plaintiffs giving evidence in the cause.

But this deposition was not excepted to, by indorsement on it, as is usual in chancery suits. On the contrary, the cause was twice heard on this deposition with others, without objection; once, probably, when Ball was alive, and once during the same term, at which his death is stated in the record; at which time, too, the issue was directed, and the depositions of the witnesses, who were dead, ordered to be read on the trial. There is, therefore, not only the absence of the necessary proof to show an interest in the witness, but all these facts and circumstances tend to prove the contrary.

But then it is said, that if Ball was not answerable for costs, there was no next friend of the infants; and so they were not properly parties to the suit; and as in that case, depositions against them could not be read, so neither could those in their favor; and that on this ground, Ball's deposition would be properly rejected. This, at first, appeared to me a formidable objection; but on reflection, I am not entirely satisfied with it. Suppose one of the defendant's important witnesses had been dead, and his deposition objected to on this ground, that Ball had never assented to become next friend, might it not well have been said in answer to this, that the suit was regularly brought, a next friend to the infants being named? He could have assented, had the deposition been in his favor, and in that case it would have been read; but as it is against him, he chooses now to dissent, and thus the process of the court will be used to entrap and defraud the parties. I should think it would be very hard to exclude the deposition on the part of the defendant under such circumstances. But, if it would have been proper to exclude Ball's deposition for this reason, and if that reason will go equally to exclude all the depositions on both sides (for

they were all taken before Burwell was appointed next friend), ought not the chancellor to have set aside the verdict, to have awarded new commissions, or to have directed a new trial, excluding all the depositions?

These are important considerations, which I should deem worthy of further investigation, and proper to be decided one way or the other, were it not that excluding Ball's testimony, and considering everything else as regular, I am satisfied, on the merits, that the writing in question cannot be supported as a good will of lands.

This paper-writing, signature and all, is in the handwriting of the appellee Corbin, who is the principal devisee; and the question is, whether its execution is properly attested and proved by two subscribing witnesses? The statute requires that a will of lands shall be in writing, and where not wholly written by the testator himself, shall be signed by him, or by some other person in his presence, and by his direction, and be attested by two or more credible witnesses in his presence.

In the case before us the alleged will is one which is not signed by the testator, as before stated, but it is proved by a witness (independent of what is said by one of the subscribing witnesses, as hereafter noticed), that Corbin acknowledged that he himself had subscribed the testator's name to it. The subscribing witness also attested it at different times.

I understand it to be clearly established by all the authorities that every important requisite of the statute must be attested and proved by each witness. Otherwise there would be but one witness to prove what the law says must be attested by two. They must attest a writing, not a blank sheet; they must attest a writing signed, and not one unsigned. When this writing was handed to the first subscribing witness, and he was asked to attest it, it was not signed. Suppose he had attested it in that form, and it had remained unsigned until the next day, when the second witness attested it, and the testator had then discovered the omission and signed it; would this be an attestation of a signed will by two witnesses? Or suppose that one witness attests in the presence of the testator, and the same witness takes the same paper into an adjoining room, where another witness only hears the testator acknowledge, and attests the same paper, but not in his presence, although the first witness is one of the highest credit, and a jury on his evidence should find that it was the same paper which the testator had but the moment before signed and published as his will, could it be established as such under this statute?

As I understand the law and all the adjudications upon it, we are not at liberty to believe anything which the statute requires to make the will a complete one, on the testimony of one witness. Suppose the statute had required but one witness, and he knows only a part of these facts, which he is to attest; as, for instance, he knows it was a writing he attested, but he does not know it was a signed writing, and it turns out that the signature which, afterwards appears to it, was not even in the handwriting of the alleged testator. Could this be established as a will executed according to the statute? And would not such a decision open a wide door to frauds?

The witnesses in this case attested at different times. The first proves that when he was called on to attest, the paper was not signed at all. When the testator was reminded of this, he directed Corbin to sign it for him, which he did in his presence. This witness then proves the signature by another. But that is not enough. He must prove, and did prove, that it was so signed by the direction of the testator, and in his presence; and although it was not stated by the testator to be his will, that he had thus caused it to be signed, yet, if the other witness had been present at that time, and had attested and proved the same facts, I am not prepared to say that it would not be a publication of a will, notwithstanding it was not declared to be such at the time; although I think, especially, where it is written and signed by another, that there are many reasons which would require a publication of it in some way indicating that it was a will, in order to guard against frauds. The other witness, however, is totally silent as to the signature. In his deposition he does not say it was a signed paper. But the verdict, after mentioning, as proved by the first witness, goes on to find that this same paper was presented to and attested by the second witness.

But what is the fair interpretation of this finding? The first witness identified the paper that he speaks of and which, on the day before, had been signed by Corbin, and attested by him; and the second witness subscribed the same paper. The jury then could well find, as they did, without proof by the second witness, that he saw a signature to the paper; and as the deposition of this witness is silent as to signature, and the jury are also silent as to this important point, except so far as they refer to it as the same paper (a term which they gave to it before it was signed at all), I cannot infer that this witness saw a signature of any kind when he attested. So, that if the will had

been signed by the testator himself, there being no acknowledgment or recognition of the signature before this witness. I think the proof that it was a signed will would be incomplete. The verdict is evidently intended simply to state the facts as proved by these two witnesses, and to submit to the court whether such proof is a compliance with the statute. They had no right to find the fact conclusively on the testimony of one witness that it was a signed paper. We must, therefore, consider it as if they had said, "so far as one witness can establish the fact, we find it was a signed paper, and that the said paper, so proved to be a signed paper, was published to, and attested by the second witness."

It was a long time, and after much hesitation, before the courts were satisfied that all the witnesses must not be present at the same time, and see the very fact of signing. Indeed they ultimately came to this decision, as it were, by piecemeal. First the testator resealed, which was considered (erroneously as is now admitted,) to be an act equal to signing; then came a case in which he drew his pen over his name before a subsequent witness. By these solemn acts it was considered that he had signed in fact before each witness at different times; and although the statute required that they should attest a signed paper in presence of the testator, yet, as it did not require them to do so in the presence of each other, and having attested what was considered the same fact, though at different times, it was thought they could as well prove it as if they had attested together. Having thus established the propriety of a separate attestation, the next question was, whether an acknowledgment of the handwriting, without resealing or drawing the pen again over the name would do? It was then discovered that separate attestations had been too long established to have that question disturbed. Admitting this to be law, then it was found that an acknowledgment of the handwriting was as good, nay, better than resealing, which at most could only be considered as a recognition of the name opposite to the seal, sealing itself being no signing within the statute; and that it was even better than drawing the pen over the name again, which some judges seem to think might be a re-execution, and destroy the previous attestation.

An acknowledgment, then, that the signature was the handwriting of the testator was considered tantamount to proof of seeing him write his name. It was capable of disproof too, if a will not signed by him was offered to probate; and although



it was admitted, that even with this guard these decisions opened a door to frauds; yet the case had gone too far to admit of the courts retracing their steps, which they would willingly have done; but they protest against going further. No case is to be found in which the acknowledgment of a signature, not in the hand-writing of the testator, was held enough.

In *Ellis v. Smith*, 1 Ves. jun. 11, Lord Hardwicke said, "It has been hinted as if this determination would lead the way to a further deviation from the statute, and by consequence allow testators' declarations that another signed for him to be good; but authority given by a testator is a collateral thing, and a thing that ought to be proved. Consequence is not to be built upon consequence, in cases of this nature. I think were things are expressly required by statute, courts are not to say other things shall be equivalent to them."

I am clearly of opinion, therefore, that there is no case under the statute of frauds in England, in which an acknowledgment has been received as equivalent to proof of actual signing, except where the testator has, in some way, recognized the signature as his own handwriting in the presence of all the witnesses, and who were therefore all capable of attesting the paper as a signed paper. Such recognition has only been held as something equivalent to personal presence at the act of signing; but it could not be so, unless the signature was at least seen, and in some way acknowledged. No case, I think, has gone beyond this, and all the judges agree that even this was going too far.

There is no case where the signature was by another, not in the handwriting of the testator, and where even a full acknowledgment that it was by another (naming him), by the direction and in the presence of the testator, has been held equivalent to proof of all these facts. Lord Hardwicke says this would not be admitted. *A fortiori*, all these things would not be inferred by a simple declaration that "this is my will," even if the witness saw that it was a signed paper. The most that such a declaration would be held to prove, according to the cases, is that this would be a recognition of the testator's own signature. I incline to think the cases do not go this far; but that on express recognition of the signature as his, accompanied with proof of that fact, if required, is as far as they establish, and as far as we ought to go.

But say it would be a recognition of his signature, if it was actually signed by him; how can an acknowledgment, in the same form of words, prove one thing, to wit: this is my hand,

if that had been the fact; or, another, to wit: this is my name, signed by such a person in my presence and by my authority, when the witness heard no such thing? If all this is to be inferred from the simple acknowledgment of the will (which is all that is found in this case, as it regards the second witness), who is to infer it? Not the witness; he can only state the fact. The jury, I think, could not do so; and if they could, they have not done so. If the court can, it must be, not as an inference of fact, but of law; that according to the true construction of the law, the second witness has proved that the testator, by this acknowledgment, has established the fact, not to the attesting witness, but to the court, that this will was signed with his name, by Corbin, in his presence and by his direction. We cannot derive our knowledge of this from the first witness. He is not competent, of himself, to prove any important fact, any more than one witness can disprove an answer in chancery. We must have two, and must make out, by construction of law, those matters of which the second witness was ignorant. We may simplify the inquiry as to our power to do this, by supposing that Corbin had signed the will before either witness attested, and that they attested, either separately or together, just such an acknowledgment as the second witness proves; could we say that this will was signed by Corbin, in the presence and by the direction of the testator?

If Lord Hardwicke is right, as I think he is, in saying that even an express acknowledgment of those facts will not do, surely one which would import at most that it was his own hand-writing will not.

One reason why a seal was not considered equal to signing was, that a seal could at this day be easily counterfeited. It only remained to counterfeit the hand-writing of a witness or witnesses who were dead, by proving whose hand-writing, the will would be established. So in the case of signature by another, all that will be necessary will be, to sign it in a hand not like that of any person known, and forge the hand-writing of witnesses who are dead, or get witnesses to swear that he acknowledged the will, without stating who wrote the signature, so as to avoid detection from the guard that circumstance would afford, and the will is established as one signed by authority.

When a man acknowledges a will signed by himself, he knows the fact that he did sign it; and if it turns out that a will is offered to probate, not signed by himself, the fraud is detected.

But he may think he is acknowledging such a will as this, when, in fact, being in extremity, another not signed by him has been imposed upon him.

I am therefore humbly of opinion that if we establish this will, we must do it on the testimony of one witness only; and as the law does not permit this, that the decree of the chancellor must be reversed.

CABELL, J., delivered an opinion concurring with COALTER, J.

BROOKS, J. The only question submitted to the court by the agreement of the parties, and the special verdict found in pursuance of that agreement is, whether the paper-writing purporting to be the last will of James B. Burwell, is proved by the attesting witnesses, Scrimger and Barrick, according to the act referred to in the verdict. The material words in that act are, "so as such last will and testament be signed by the testator, or by some other person in his or her presence, and by his or her direction; and moreover, if not wholly written by himself or herself, be attested by two or more witnesses in his or her presence." It is admitted that Scrimger's testimony is entirely in compliance with the statute. He proves all that is required by it; but in examining the testimony of Barrick, the second witness, no aid is to be derived from Scrimger's testimony, because the statute requires two witnesses to the same facts. Nor is the testimony of Barrick to be eked out by anything in the verdict, unless he also proves the facts required by the statute. So far the paper-writing is still proved by one witness only, and the statute is not complied with. What is proved by Barrick? He says (as found by the jury), that he was sent for, and went to the house of James B. Burwell; that he found him sitting on the bed with the said paper-writing in his hand (he calls it the said paper-writing before it was attested by him, as Scrimger does before it was signed by him or by Corbin, for Burwell), when the said Burwell asked him to sign that paper; and thereupon he signed his name to the said paper as a witness, in the presence of the said Burwell; that he then asked the said Burwell what it was he had signed; and the said Burwell replied, "it is my last will, but you need not make a talk of it; it is time enough." He (Barrick) says nothing to the fact that the paper-writing was signed by Burwell or by Corbin for him, at the time he attested it.

From all that appears by his testimony, it was not signed by either of them, at the time he attested it. In calling it the said

paper-writing before the jury, he points to a time, before it was signed by himself, and proves nothing more than that it was the same paper that he had signed. If he meant anything more, he would not have called it "the said paper-writing" when it was not signed by himself, and when it was so signed, as it was when it was before the jury. Scrimger spoke of it in the same sense. The requirements of the statute have been before stated; it ought to have been signed by Burwell himself or by some one for him, or it was not a perfect will to be attested, according to the provisions of the act. It would not be contended, that if it was attested before it was signed, it would be a good attestation, because it would let in the frauds intended to be prevented. For example: If in this case Scrimger had attested it when handed to him by Burwell, and before Corbin had apprised Burwell that it was not signed, and signed it for him, it would not have been attested even by Scrimger according to the statute.

But Burwell acknowledged to Barrick, that the paper-writing was his last will; so in effect he did to Scrimger, though not in terms, when he asked him to witness it before he was reminded by Corbin that it was not signed. He thought no doubt, at that time, that it was his will, though not then signed by any body. This example extracted from this case, shows the danger of dispensing with proof, that it was signed, when attested according to the statute. The case before the court has been nowhere decided, that I know of. The question whether the factum of signing must not be proved by all the witnesses, has been very much discussed in all the cases from *Lemain v. Stanley*, 3 Lev. 1, down to the cases of *Grayson v. Atkinson*, 2 Ves. sen. 454; and *Ellis v. Smith*, 1 Ves. jun. 11.

That point has been put at rest very reluctantly by the English judges. Some of them seem to think that great frauds will be let in, by dispensing with this supposed requirement of the statute of Charles, which is like our own as regards the present inquiry. But in no case have they dispensed with proof, that the will was signed by the testator or by some one for him, according to the statute. In the case of *Grayson v. Atkinson*, the acknowledgment by the testator was, that it was his signature which lord Hardwicke calls proving the factum of signing in some sense; and his illustration of his meaning by the practice of acknowledging the execution of a bond by the party acknowledging to the witness that the signature was his hand, shows, that proof of the signature of the testator was not

to be dispensed with. If Burwell in this case had acknowledged the signature to be his, it would have been proof, within the cases of *Grayson v. Atkinson* and *Ellis v. Smith*; the question being in these cases, whether the signing was proved according to the statute. In the case cited from Vesey and Beams, there was proof also of the acknowledgment of the signature. If the case now before the court had presented the same question, I should incline to the opinion, that the bare acknowledgment of Burwell, that the paper-writing was his last will, in the absence of all proof that it was signed at the time by him, would be insufficient under the statute. But the question here is still a broader one.

Does Barrick prove that Corbin signed the paper-writing for Burwell, at his request, and in his presence, according to the statute? In another form, does the acknowledgment of Burwell to Barrick that the paper-writing was his last will, prove those facts? I think not. In the case of *Ellis v. Smith*, Lord Hardwicke, after deciding that the acknowledgment of the signature by the testator was proof of his having signed it, goes on to remark "that it had been hinted as if this determination would lead the way to further deviations from the statute, and by consequence would allow a testator's declarations that another signed for him to be good. But authority given to another is a collateral thing, and a thing that ought to be proved. Consequence is not to be built on consequence, in cases of this nature."

This, it is true, was not the question before the court; but it naturally grew out of the one that was, and had no doubt been much reflected on; and although it may be called an *obiter* opinion, it is entitled to great weight. In the case before the court, Burwell made no such acknowledgment as in the supposed case. He did not say to Barrick that Corbin had signed it for him, at his request and in his presence. It is still a weaker case. He only acknowledged the paper-writing to be his will; which, whatever might (upon consideration) be my opinion, on the case put by Lord Hardwicke, I think is not adequate proof under the statute, that it was signed by Corbin for Burwell, by his direction, and in his presence. The statute requires two witnesses to the same facts, as a security against the perjury of one. Supposing Scrimger to be perjured, Barrick's testimony is insufficient; and so much of the decree as establishes the will in question, to be a good devise of the real estate, I am of opinion, ought to be reversed, and the rest affirmed.

ROANE, J. It is my fortune to differ in opinion on this case, after great deliberation, from all the other judges. It is, therefore, my right, and perhaps my duty, to assign, somewhat at large, the grounds and reasons of that opinion. Upon the trial of the issue in this cause, the appellants produced the deposition of William Ball who was admitted to be dead, and whose deposition had been taken without objection in the court of chancery. That deposition was objected to by the appellees, on the ground that he was named in the bill as next friend to the infant complainants, and therefore liable for costs, and interested; and the said objection was sustained by the court, and the deposition rejected. The circumstance that this deposition may have been before read in the court of chancery is of no account. That court and every court acting under its authority has always, even up to the time of its final decree, a power to reject depositions, which, from intrinsic evidence existing of record, appear to be illegal.

It is admitted that there was no specific order of the court admitting Ball as the next friend; but the question is whether under the practice of this country, under all the circumstances of this case and all the admissions of the parties, that fact ought not to have been taken for granted. Those circumstances narrowed the inquiry before the court. The real question, therefore, was not so much whether Ball was the legalized next friend of the plaintiffs, as whether the appellants were at liberty, under the circumstances and admissions aforesaid, to make the objection.

On this subject of *prochein ami*, the doctrine is that the nearest relation is generally the next friend of an infant; but as that relation may, himself, have injured the infant, and be liable to a suit therefor, or may be otherwise an improper person, the court will permit any person to institute a suit on his behalf, and he is to be named as next friend in the bill: Mitf. 25. That person ought, however, to be a person of substance, because he is liable to pay the costs of the suit: 1 Atk. 570. While it is conceded that this next friend ought to be admitted as such (1 Str. 708), it is believed that under the practice in this country, his being named in the bill, and the suit going on without objection, is a permission on the part of the court, and amounts, in effect, to such admission; and much more, where he has been recognized, as in this case, by the subsequent acts of the court, and the subsequent acknowledgments of the parties.

This next friend is not only liable for the costs, but is to be removed if he is treacherous to, or negligent of, the interests of the infant: Mitf. 25; and it is supposed that all these checks will generally prevent improper persons from obtruding themselves, and this consideration will perhaps justify a less strict principle in this particular on the part of the court. All that is required, even in relation to the party interested in the costs, is that the next friend should have been recognized and sanctioned by the court. In relation to his co-plaintiffs, they shall be concluded, by their own acts and admissions, from objecting that he is not the legalized next friend of the infants.

In the case before us, it is true that Ball is not named as next friend in the bill. A blank is left for the name in that bill; but this omission is abundantly supplied. In the heading or caption of the record or proceedings, he is named as such. He is so named at the rules in October, 1812, when a conditional order was made, taking the bill for confessed; and this order, so headed, was set aside in court on the twelfth of October, 1813. To all these proceedings the appellants were parties and privy; and in the last case an order was made in court, setting aside a rule in which Ball is stated to be the next friend of the infants. Was not this a concession by the court, and an admission by the co-plaintiffs that he really stood in that character? Again, to say nothing of the admissions probably contained in the commission under which this deposition was taken, how does the matter stand, upon the order of the twenty-first of September, 1816?

On that day, Bacon Burwell, one of the appellants now making the objection that Ball was not in reality the next friend of the infants, moved the court of chancery, by his counsel, to be himself permitted to prosecute as next friend in lieu of W. Ball, deceased. This motion was granted by the court, and thereafter he acted as such. After this can Bacon Burwell or the court be permitted to deny that Ball had been the next friend in his life-time, and was so when this deposition was taken? So also the proceedings and verdict in Carolina court all state, and therefore admit, that Ball had been the next friend, as does also the bill of exceptions taken on the part of the appellants. Nay, that bill even admits further (contrary, however, as it appears, to the fact), that Ball was named as next friend in the bill filed in this cause. The appellees objected to Ball's deposition because he was so named therein, and the appellants, not denying it, but admitting the fact, only proved by one of the

counsel that Ball was not consulted on the subject. The fact of his having been named in the bill as next friend is, however, distinctly admitted by both the parties to the bill of exceptions.

However it might be, therefore, in relation to Ball's representatives, were they now before the court and charged with the costs, can it be doubted that *quoad* the appellants, their own repeated admissions, and the repeated recognitions of Ball as the next friend by the court, will estop them from making the objection? Notwithstanding this, however, they were still not without remedy as to getting his (Ball's) deposition during his life-time. They might, if his evidence was important, have had his name struck out of the record, another next friend substituted, and then have taken his deposition: *Mittf.* 25. They, however, did not pursue this course, and must abide by the consequences of their omission to take it. As for the objection on the part of the appellees, it was not necessary for them to state and prove a fact which was already admitted of record.

Ball's deposition was therefore, I think, rightly rejected by the court. But even if it were otherwise, it does not follow that for that error the decree should be reversed. It is not at present distinctly seen that the decision of the jury should have been different if that deposition had been admitted. On that point, however, I have formed no conclusive opinion.

I come next to consider this case upon the merits. This cause having been heard in the court of chancery, upon the exhibits and depositions of the witnesses, and those depositions being found to be conflicting and contradictory, an order was made by the said court, referring the question of the validity of the will to a jury, with the usual provision, that on the trial of the issue, copies of the bills, answers, exhibits, and depositions of such of the witnesses as are dead, or cannot attend, should be read in evidence. In the trial of the issue in the superior court upon that evidence, and the jury at the end of the third day not having agreed upon a verdict, on the fourth day, for the purpose, as is supposed, of facilitating that decision, it was agreed by the parties that the question of law arising upon the evidence of the subscribing witnesses, in the event that the evidence should be credited by the jury, should be reserved by a special finding of the facts that the jury may determine to be proved by that evidence, to be determined by the proper court.

This agreement excluded from the consideration of the jury all the other testimony in the cause, except that of the two subscribing witnesses, and that which respected their credibility;



and considering that credibility was not only expressly referred to the jury, as aforesaid, but was also peculiarly proper for their consideration, I shall shut my eyes upon all the other testimony existing in the cause, except the facts which are specially found by the verdict. I must, also, again remark, that as the special finding is agreed and required to be made upon the evidence of the subscribing witnesses (that is, of both of those witnesses), that finding is to be taken as made upon the evidence of both the said witnesses. The jury will be considered as having conformed to the agreement of the parties, which consigned this duty to them, and not as having violated it. The only exception from this construction will be in relation to facts which irresistibly appear from the verdict, or are thereby expressly admitted to have been found on the testimony of one of the witnesses only. We must so consider this verdict, however, in point of fact, the case may be; we cannot know that fact to be otherwise, unless it is regularly manifested to our view. Subject to these exceptions and limitations, every fact found in this verdict is to be considered as based upon the testimony of both the subscribing witnesses, and it does not lie in the mouth of either of the parties to aver the contrary.

While under the influence of this rule of construction, as applied to so much of the verdict as relates to Scrimger's attestation, it must be admitted that Barrick was then absent; a different result will take place in relation to what passed at the time of Barrick's attestation. It may well be, for anything seen in this verdict, that Scrimger was then also present; and if we were even to refer to the depositions of those witnesses as contained in the record, there is nothing therein to show the contrary. Scrimger, although present on the third, might have been also present on the fourth of September. This, however, we are authorized, if not compelled, to infer from this verdict, taken in connection with the agreement of the parties; and that inference is irresistibly strengthened by that part of the verdict which identifies the paper in question, with that which was attested by Scrimger and Barrick. In relation to Barrick, Scrimger could not have well known that fact, unless he were personally present. If this is in reality, or must be taken to be the fact, upon the true construction of the verdict, then we have the testimony of both the subscribing witnesses, both as to the testator's acknowledgment of the will, and also as to Barrick's attestation of it. That, however, is entirely of supererogation, as I shall presently attempt to show. One witness is enough

as to such attestation; and Barrick's testimony as to his attestation, is fully equal to Scrimger's, which, as to him, is on all hands admitted to be sufficient. There is no difference between the two cases, except that Scrimger attests an actual signing of the paper by the testator by means of Corbin; whereas Barrick only proves his publication and acknowledgment of it; a difference which, I shall presently endeavor to show, is entirely unimportant. An acknowledgment of a signature is only a signing in another form. In principle it is, in truth, a signing.

Before I go into the question whether the acknowledgment of a will, or signature thereto, is equivalent to an attestation of the specific fact of the signing itself; and while I do not abandon the ground I have taken, that the testator's acknowledgment of the will before us, and the attestation by Barrick must be taken, upon this verdict, to be proved by Scrimger, as well as Barrick, when Barrick alone, like Scrimger, was amply sufficient to establish the fact; I must make one or two preliminary observations.

In the first place, it is not necessary that the subscribing witnesses should attest together, or at the same time: 7 Bac. Abr. 30. Again, while it is admitted that a will must be a perfect will, by signature, or by signature and acknowledgment, *quoad* every witness at the time of his attestation, yet it is not necessary that the witnesses should see the signature, or even know that the paper acknowledged is a will. All that is necessary is, that its identity in its complete state, should be established at the trial, in reference to the paper attested by the witnesses. The attesting witness, however, is not perhaps indispensable to prove the existence of the signature, although it must be shown to be the same paper that was attested by him. We are told by Roberts on Wills, p. 23, on the authority of Swinburn, and which the first author says equally applies to devises under the statute of Charles II., that the witness need not know the contents of the paper he attests; that it is one of the advantages of written wills that the testator can conceal the contents; that it is enough to show the paper to the witnesses, and say "this is my last will," provided they can prove the identity of the writing; and these writers recommend it to witnesses to write their names on the back of wills to enable them to do this. Again, it is said, Bac. Abr. 317, that if a testator signs his will, but delivers it as his deed, it is sufficient; for that it is not necessary for the witnesses to know that it is a will. Admitting for the present, that the acknowledgment of a paper as a will, or

of the signature, is equal to the proof of an actual signing. there may be cases in which the identity of the paper is as much established, though it was unseen by the witness, as if he had actually seen the testator sign it; as for example, where a witness attesting a paper acknowledged to be a will, but the contents of which were not read by the witness, nor the signature seen by him, has that paper, so acknowledged, delivered to him by the testator, sealed up, and he keeps it so sealed and indorsed, in his desk until the time of trial; would not this be a full and complete evidence of the identity of the paper? And if it was then found to have a signature to it, would it not amount to conclusive proof of the testator's acknowledgment of the signature?

These *desiderata* entirely exists in the case before us. The testator not only published to Barrick the paper in question, and acknowledged it to be his last will, but the jury further find that the paper thus acknowledged to, and attested by Barrick, was the same paper that was also attested by Scrimger, and proved in the superior court. The verdict had before found (and you must take all its parts together), that the paper signed by Scrimger the day before was then also signed by Corbin for the testator, at his request, and the will found on the record, and proved in the superior court, is also found to have a signature to it. When, in addition to these facts, Barrick swears (to say nothing of Scrimger on this point) that the paper he signed is the same paper with that thus referred to, can we by any possibility even imagine that it was an unsigned paper when he, Barrick, attested it? Can a paper acknowledged and attested on the fourth, and proved and found to be the same with one signed and attested on the third, and also found at a future time, to be so signed, be taken to have been intermediately an unsigned paper? Is an unsigned paper the same with one that is signed? Unless, therefore, you go in quest of quibbles, rather than of substance, it is both proved and found that the paper in question was a signed paper, when it was attested by Barrick. We are not at liberty to differ from the jury upon this point, and to imagine that a paper was a different paper from another, when the jury have found them to be the same. It is not easy to conceive a stronger circumstance of discrimination, on the contrary, than that which exists between a complete and signed paper, and one which is only inchoate and unsigned. I do not admit that even Barrick's evidence is indispensable to verify this fact of the identity, unless it be under

the particular terms of the agreement of the parties; but if it is, we have it upon this verdict; and, as I have before said, we have that of Scrimger also.

This view of the facts of this case brings to our consideration the only real question existing in this cause. That question is, whether a will signed for another, by his express direction, and acknowledged and published by the testator as his will, is duly proved under that number of our statute, which legalizes a signature for a testator by the hand of another. While this question has several times occurred in relation to wills signed by the testator, with his own hand; it has not occurred that I can find in relation to a will signed for him by the hand of another. Thus the question remains to be decided upon principle; and the inquiry is, whether there is in fact any essential difference between the two cases. The counsel for the appellants seem to have conceded that there is not. They seem to have conceded this by bending nearly all their force against the sufficiency of the acknowledgment of a will of the first description; a course which would have been wholly unnecessary, not to say improper, if the objection applied with more force to a will like the one before us.

As to the first question, *i. e.*, one touching a will signed by the testator himself, it has been expressly decided. If you throw out of view circumstances which are entirely unimportant, in the case of *Westbreach v. Kennedy*, 1 Ves. and B. 302, is a direct authority. In that case, as to two of the subscribing witnesses (Emerson and Bogs), the testator only produced the will to them, published it as and for his last will, and requested them to attest it. He did not sign the will before either of these witnesses, nor acknowledge particularly the handwriting subscribed to it, but only acknowledged the paper as his will. In all these particulars, that case is exactly like the case before us. That case is therefore an express authority in this, except so far as the circumstance that the testator also sealed that paper in the presence of the witnesses, can make a difference; a circumstance which I shall presently endeavor to show is entirely unimportant. In that case, also, it is only proved that the will appeared to be signed to the third witness at the time of his attestation; whereas, in this case, that fact is found to have had an existence, though I admit it is not found to have been signed, nor is it necessary, *totidem verbis*. That case is therefore less strong in this particular than the case before us.

The only circumstance which can differ that case from ours,

therefore, is the sealing of the will in the former. Sealing, however, is not the signing required by the provisions of the statute. It is at most only a circumstance, going to show an acknowledgment of such signing. It is, therefore, entirely unimportant, when you have the superior and more conclusive evidence resulting from the acknowledgment and delivery. That which is only a circumstance, tending to show an acknowledgment, is as nothing when compared to the actual acknowledgment and delivery itself. That circumstance was, therefore, entirely supererogatory in that case, where the acknowledgment and delivery also existed; nor will it be missed in this case, where we have also that acknowledgment. In that case the circumstance of sealing was at most only relied on as one from whence to infer an acknowledgment, and was merged, if I may say so, in the actual acknowledgment and delivery, which was proved in the case; it was included in it. It would be also held to be included in this case, if it existed, and the omission is unimportant, as it does not. Its effect and importance entirely vanishes under the solemn acknowledgment and delivery which is found to have taken place as to the will before us. The existence of the circumstance of sealing in that case, and its non-existence in this, cannot therefore differ the two cases, to which the actual acknowledgment itself is common, and which, as to all important particulars, are precisely the same.

This would be the result in relation to a mere circumstance, however important and unexceptionable. The objection holds with increased force, however, as to the mere fact of sealing, considered as a circumstance authenticating a signature. Such sealing is entirely of a weak and unimportant character. It is entitled to but little weight, indeed. Thus, it is said by Chief Justice Willes, in *Ellis v. Smith*, 1 Ves. jr. 11, that sealing is not signing. Again, it is said in *Powell on Devises*, 76, that sealing being at the time of making the statute no longer a mark of distinction, as it certainly is not, when the sealing is with a wafer or a scroll, that circumstance was rejected, and a signing by the testator substituted. Again, he says, p. 67, that sealing is not signing; for, that if it were, it would be very easy to forge a will which, in relation to the handwriting of the testator, is more difficult. It is also said that while sealing is no longer so distinguished as to identify the fact of the signing, the acknowledgment of that fact is considered as a proof thereof. Sealing, then, being repudiated as a signature, on account of

its incompetency to discriminate one paper from another, it has little or no weight when used to identify a signature. Every seal wants an ear-mark to distinguish it from other seals. It is attempting to prove *notiora per ignotius*; and the seal itself is more uncertain and unknown than the signing it is intended to authenticate. I hazard but little, therefore, in saying that this circumstance is entirely weak and unimportant, and that its weight is as nothing when compared to a solemn acknowledgment and delivery itself, as in the case before us. The former circumstance is entirely subordinate and inferior to, and is comprehended within, the latter.

I throw, therefore, out of the case of *Westbreach v. Kennedy*, as being entirely deceptive, subordinate and unimportant, the fact of the sealing which existed in that case; and then the two cases are precisely alike. Then it is decided that the acknowledgment of the will is entirely sufficient, and that there need not be a specific acknowledgment of the signature of it. It puts to rest the doubts on this subject, which had before been mooted in the English courts, and advances a step further in relation to the statute, in favor of common sense. If I acknowledge a paper as my will, which has my signature annexed to it, I acknowledge that signature in common with every other part of the writing.

But this last decision was not wanting to settle this question conclusively, to my satisfaction. It had been before settled, upon the principle of the adjudged cases. Thus, in the case of *Grayson v. Atkinson*, 2 Ves. 456, while it was admitted by the court that the question whether the acknowledgment of the signature was sufficient, had been *vexata quæstio*, it was decided to be sufficient. It had in this case been objected, that as the word "attested" was added to the word "subscribed," in the statute, it imported that the witnesses must attest the very fact of the signing, and that an acknowledgment of the will, or even of the signature, was not sufficient; but it was resolved by the court that the attestation of the acknowledgment of the will is an attestation of the fact acknowledged, and is to be construed according to the rules of evidence, applying as at the time of enacting the statute, in other cases; as in the case of a bond, for example, which being made and signed, and afterwards acknowledged before others, by the obligor, to be his bond, was held to be evidence of a signing by him. Again, it is said in *Powell on Devises*, p. 71, that as an attestation upon an acknowledgment is good in every other case, so it is in

the case of a devise. Again, it is said, p. 76, that an acknowledgment of an instrument as a man's deed, necessarily implies a delivery of it; and in principle there is no difference between that case and the one before us. You can as well imply a signing, as a delivery of a given instrument. The first as well as the last is incidental to the acknowledgment. Again, we are told, *Id.*, p. 121 (and it is an authority decisive of the question before us), that although the statute of Charles says that the will must be signed by the testator, yet that an acknowledgment of the signing is as good as proof of seeing the testator sign. It would indeed be an anomaly in the law, if it were not so. In all other cases, the acknowledgment of the fact in question is fully equal to any evidence of it.

I take it, therefore, to be a point not at this day to be questioned, that the acknowledgment and publication of a paper as a will is a sufficient proof of the signing thereof, if it further appears that the paper has a signature. If there was any doubt before, the case of *Westbreach v. Kennedy*, has put the same at rest; to say nothing of the unanswerable principles on the subject of acknowledgment, to which I have adverted. There is, perhaps, however, no adjudged case in relation to a will signed for another, as in the case before us. That, however, is not very strange, when there is perhaps a single conclusive decision in relation to the more common case of a signature by the testator himself. There is, however, no decision against us, and in principle there is no difference between the two cases. It was indeed said by Lord Hardwicke, in *Ellis v. Smith*, that the decision then to be given might lead the way to further deviations from the statute; and by consequence to allow the testator's declaration that another signed by him, to be good. He added that an authority given by a testator is a collateral thing, and ought to be proved; and that consequence is not to be built upon consequence in cases of this kind. I will here remark, that these observations of this judge are entirely *obiter* and extra-judicial; that they did not apply at all to the case then before the court; that this point had not been argued; and that everything collateral or not collateral which is susceptible of proof is also capable of being acknowledged; which acknowledgment is indeed only a superior species of proof.

The signing of a will for another, at his request, is indeed rather a more complex idea than a signature by oneself; but it is equally within the knowledge and power of the party; it is equally susceptible of proof. Admitting the existence of the

signature, I am just as competent to admit that it was made by another at my request as that it was annexed thereto by myself. Although there may be shades and degrees of difference between the facts thus admitted, there is no difference in principle between them. It would be an useless waste of time to pursue this discussion any further. The counsel for the appellants wisely disclaimed a difference between the two cases; or if they made any difference it was but a faint one. In fact and in principle there is no kind of difference between the two kinds of signature now in question. In both the testator is competent to acknowledge that which, taken in reference to the case before the court, complies with the requisitions of the statute. The general acknowledgment of the testator, comprised in the case before us, carries with it all the particulars. It is equivalent, as applied to this case, to a specific acknowledgment by the testator that the will was signed at his request by the hand of another.

These are my sentiments upon this case, after a long and mature consideration. I am, therefore, clearly of opinion that the will in question has been duly proved according to the requisitions of the statute; that the decree of the court of chancery, which has affirmed the judgment of the superior court, and the conditional verdict of the jury, should be itself affirmed; and that the will before us should be established. The other judges are, however, of a different opinion, and their decision is, that the decree should be reversed, and the following entered as the opinion and decree of the court:

"This day came the parties," etc., "and the court," etc., "is of opinion, that the paper-writing in the bill mentioned, which is alleged by the appellees to be the last will and testament of James B. Burwell, is not proved by the attesting witnesses, according to the act of assembly referred to in the verdict; and that the said decree, so far as it establishes the said paper-writing to be a good devise of real estate, is erroneous. Therefore it is decreed," etc.

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In *Dudleys v. Dudleys*, 3 Leigh, 436, the principal case is doubted; Carr, J., saying it "went too far;" and Chancellor Walworth, in *Jenncey v. Thorne*, 2 Barb. Ch. 40, stated that it was virtually overruled by *Dudleys v. Dudleys*, on the proof necessary to establish the execution of a will. The general opinion has been that the court, in the principal case, went too far in departing from the rule of the English cases as to the proof required in the probate of a will; and in subsequent cases the courts placed their decisions on the English doctrine: See *Jackson v. LeGrange*, ante, 237.

In *Smith v. Jones*, 6 Rand. 33, one of the attesting witnesses proved that



the testator asked his wife to get the paper; that she read it to him; that this was before signing; that the testator said it was his will, but he could not write at that time; that the other attesting witness put the name and mark of the testator to the will, and then put his own name, and took hold of the witness' hand, and made her mark, she being illiterate. The court of appeals expressed the opinion, that if the other attesting witness had been examined and had given evidence which agreed with this, the probate court ought to have admitted the paper as a will of lands; and this upon the ground that, as the record showed the fact that the testator was in possession of his understanding, but being paralytic, could not write, the court ought to have concluded from all the circumstances, that the will was signed by the said other attesting witness for the testator "in his presence and by his direction," and moreover, was attested by two witnesses in his presence.

In *Dudleys v. Dudleys*, one witness testified that he wrote the will, and signed the testator's name thereto in the presence, and at the request of the testator; and that he subscribed his name as a witness, in the testator's presence. Another witness testified, that some years afterwards, the witness being at testator's house, it was suggested to the testator that it was a favorable time to have that will witnessed, to which the testator assented, and the paper in question was produced. The witness took the paper near to the testator, and inquired whether he acknowledged it; the testator said he did; and thereupon, in the presence of the testator, the witness subscribed the paper. It was held that the testimony was sufficient to establish the paper as a duly executed will, both of real and personal estate.

In *Jesse v. Parker*, 6 Gratt. 64, the court say: "That although there must be satisfactory proof that every statutory provision has been complied with in order to establish a will, the law does not prescribe the mode of proof, nor that the will shall be proved, as well as attested, by a specified number of witnesses. If such proof were to be required from each subscribing witness, the validity of wills would be made to depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had in fact been complied with."

In consequence of the decision in *Dudleys v. Dudleys*, where one witness attested in 1818, and the other in 1825, a statute was passed in 1849, providing that the witnesses should be present, and attest at the same time. In *Pasmore v. Taylor*, 11 Gratt. 220, we find an elaborate opinion of Moncre, J., on the construction of this law.

In *Greene v. Craie*, 12 Gratt. 252, what shall be a sufficient attestation in the presence of the testator was considered. A paper prepared as the will of C. was read to him by the scrivener, and approved; and then the scrivener, at the request of C., subscribed C.'s name, and by like request, attested it, but no other witness then. About three days after C. acknowledged the paper as his will, in the presence of H., who, at his request, attested in his presence. No other witness attested on that day, but about four days after H. being again at C.'s house with W., C. requested W. to attest the paper, which he did, in the presence of H. and C., and C. then acknowledged the paper, in the presence of H. and W. The will was held to be duly executed.

The statute in New York, as in many other places, makes four things necessary to the due execution of a will: First, it must be subscribed by the testator at the end of the will; Second, the subscription must be made in the presence of each attesting witness, or it must be acknowledged by the testator to have been made, to each attesting witness; Third, at the time of

such subscription or acknowledgment, the testator must declare the instrument so subscribed to be his last will and testament; Fourth, there must be at least two (three by statute of frauds) attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator. These requirements were considered in *Doe v. Roe*, 2 Barb. 200; where it is held that a will is duly executed when the several acts required by the statute have been performed at the same time, but not necessarily in the order stated.

In *Baskin v. Baskin*, 36 N. Y. 416, it is held, that if the signature be written by another, and concealed from the view of the testator and the witnesses, the mere publication of the instrument as his will, cannot be deemed an acknowledgment that the unseen subscription was made by his direction.

The mode of subscription and attestation is well considered in *Jackson v. Jackson*, 39 N. Y. 153, and *Gilbert v. Knox*, 52 Id. 125. In the former it is held, that in respect to the subscription by the testator in the presence of the witnesses, and his declaration that the instrument in his last will and testament, which the statute requires to be simultaneous, it is sufficient that they be on the same occasion; and it is not material that the declaration immediately precedes the subscription. Where the subscription is by a mark, it is the mark, and not the name which may be written around it by another, which constitutes subscription; but the writing of the testator's name, with the words "his mark," done by a third person to identify the testator's subscription by a mark, is not the "signing of the testator's name by his direction," as a subscription of the will which the statute contemplates.

In *Gilbert v. Knox* it is held that the declaration of the paper being a will must come from the testator himself; but the words of request or acknowledgment may proceed from another, and will be regarded as those of the testator, if the circumstances show that he adopted them, and that the party speaking them was acting with his assent: See *Remsen v. Brinkerhoff*, 26 Wend. 325.

Though two witnesses are required, yet, where circumstances corroborate the testimony of one, it is sufficient: *Derr v. Greenwalt*, 76 Pa. St. 239; *Greenough v. Greenough*, 11 Pa. St. 489; *Rash v. Purnel*, 2 Harring. 448; *Jackson v. Le Grange*, ante, 237, and note.

The requirements of the statute in Illinois are considered in two recent cases: *Doran v. Mullen*, 78 Ill. 342; *Crowley v. Crowley*, 80 Id. 469. In the last it is held, that four things must concur before a will is probated: The will must be in writing, and signed by the testator or in his presence by some one under his direction; it must be attested by two or more credible witnesses; two witnesses must prove that they saw the testator sign the will in their presence, or that he acknowledged the same to be his act and deed; and they must swear that they believe the testator was of sound mind and memory, at the time of signing or acknowledging the same.

## HARVEY v. ALEXANDER.

[1 RANDOLPH, 219.]

**PAROL PROOF OF CONSIDERATION.**—Where the consideration expressed in a deed is "love and affection," and "one dollar," parol proof of other valuable consideration, is admissible.

**TRUSTEE AS WITNESS.**—A mere naked trustee named in a deed is a competent witness in a suit to set aside such deed.

**CONSIDERATION OF DEED TO WIFE.**—Where a wife had, at her marriage, a large real and personal estate, which she allowed her husband to dispose of, upon his promise to settle upon her other property of equal value, and after he had partly complied with his promise, a separation having been agreed upon, he made a deed for her benefit, the consideration of which was the excess of her property so disposed of by the husband over that settled upon her, together with her release of all right of dower in his remaining property, and of all claim for future support, it was held that the deed was valid as against creditors.

**UNRECORDED DEED.**—A deed not recorded within the time prescribed by statute is void as against creditors; and for the purpose of determining whether it has been duly recorded, it will be presumed to have been delivered at its date, unless the contrary appears by the record.

**APPEAL** from the court of chancery. The complainant, Harvey, a creditor of William T. Alexander, for a debt contracted in April, 1802 (the said Alexander being now insolvent), filed his bill to set aside two certain deeds made by the said Alexander, in trust for his wife, to John Taliaferro, one of the defendants, dated respectively October 10, 1802, and December 16, 1804, on the ground that the same were executed voluntarily and fraudulently. The consideration expressed in the first deed was "natural love and affection" for the grantor's wife, and also the sum of "one dollar in hand paid by the said John Taliaferro." It appeared, however, from the evidence of the said Taliaferro, admitted over the objection of the complainant, that the said deed was executed in part fulfillment of a promise previously made by the said Alexander to his wife to settle upon her property equivalent in value to a large amount of real and personal estate which she brought to him at her marriage, and which, in consideration of the said promise, she had permitted him to dispose of, and to apply the proceeds to his own use; that at the time of making the said deed, the said Alexander was wealthy, and not indebted beyond the current accounts usual to men of his large income; that in consideration of a reversionary interest in the premises granted in said deed to the son of the said Taliaferro, he, the said Taliaferro, accepted the said deed of trust, agreeing to pay the rent of six hundred

pounds reserved therein to the said Alexander and wife, and to perform the trusts therein expressed; that as a part of the consideration of said deed he, the said Taliaferro, on the same day, conveyed to the said Alexander for his own life and that of his wife, a valuable tract of land, with remainder to the issue of the said wife, and had paid him, the said Alexander, the further sum of five thousand dollars, and had punctually paid the rent reserved, etc. It further appeared that a large part of the property conveyed by the said deed, and also by the second deed, was, after the insolvency of Alexander, conveyed by the wife of the said Alexander to James G. Taliaferro, for a full and fair consideration, which had been wholly paid, the said James G. Taliaferro alleging that he had no notice of the plaintiff's claim. It appeared also that William Alexander and John Taliaferro joined in this deed as mere nominal parties. The circumstances in relation to the execution of the deed of December 16, 1804, and the remaining facts of the case, are stated in the opinion. The chancellor having dismissed the bill, the complainant appealed to this court. The grounds of the appeal sufficiently appear from the opinion.

*Stanard*, for the appellant, cited *Clarkson v. Hanway*, 2 P. Wms. 203; *Peacock v. Monk*, 1 Ves. 128; *Maigley v. Haner*, 7 Johns. 341; *Eppes v. Randolph*, 2 Call. 125.

*Wickham*, for the appellee.

By Court, CABELL, J.\* The appellant, a judgment-creditor of William T. Alexander, for a debt contracted in April, 1802, preferred his bill, seeking to set aside as voluntary and fraudulent two deeds executed by the said William T. Alexander, one of them bearing date the tenth day of October, 1802, the other bearing date the sixteenth of December, 1804. He further contends that if the deeds be not fraudulent, the last of them is void as to creditors, not having been recorded within the time required by law. The appellees deny the fraud, and aver that both deeds were executed for valuable and meritorious consideration. And as to the deed of 1804, they aver that although it was not recorded within eight months from its date, it was recorded within eight months from the sealing and delivery thereof. The chancellor dismissed the bill of the appellant, who appealed to this court.

The deeds will be separately examined: 1. As to the deed of

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\* Tried before the special court of appeals; present, Cabell, Coalter, White, Breckinrough, Smith, Allen, and Richard M. Parker, JJ.

the tenth of October, 1802. The considerations expressed in the deed are "natural love and affection," and "one dollar."

The counsel for the appellant, considering this deed as voluntary on the face of it, contended that proof of valuable consideration was inadmissible, as being inconsistent with the deed. But the court is of opinion that the question whether evidence inconsistent with the deed can be admitted does not arise in this cause. This is not the case of a deed purporting to be for good consideration only. It is in express terms, for valuable as well as for good consideration. It is true that the valuable consideration expressed is only one dollar. But one dollar, viewed as a consideration, is as much a valuable consideration as a million of dollars. The real question is whether a deed purporting to be for "love and affection," and for "one dollar," and assailed as being fraudulent as to creditors, can be supported by evidence showing that in addition to the one dollar expressed, full value was received by the grantor. This question may be simplified by supposing the deed to have been between the same parties, and for the same purposes, and that the only consideration expressed in the deed was the sum of one dollar, paid by the grantee. It could hardly be doubted that the evidence would be admissible in that case. Indeed, the principle of the objection made by the counsel for the appellant, that the evidence would be inconsistent with the deed, does not apply to such a case. It is believed to have been the practice at an earlier period, both in England and in this country, for deeds not to express the actual sum, but a nominal one only, and yet the court has not seen a single case in which it has been held incompetent to the party claiming under the deed to aver and prove the sum really given.

*The King v. The Inhabitants of Scamonden*, 3 T. B. 474, is an authority in point, showing that such evidence is admissible. In that case the consideration expressed was twenty-eight pounds, whereas the sum really given was thirty pounds, which it became necessary to prove. Lord Kenyon said it was clear that the party might prove other considerations than those expressed in the deed. The case of *Eppes v. Randolph*, 2 Call. 125, and *Quarles v. Lacy*, 4 Mun. 251, have a strong bearing on this point. In the latter case there was no consideration expressed as moving from the wife, and only the consideration of one dollar from the trustee. (See the original record.) There can be no reason for not extending the same rule to a deed which, in addition to a valuable, states also, a good considera-

tion. On a view of the authorities, this court is clearly of opinion that such evidence is admissible, and more especially where, as in the present case, the persons beneficially interested in the conveyance are a *feme covert*, and an infant to whom, in consequence of the incapacities under which they labor, greater indulgence is extended for any defects in points of form. And in estimating the amount of the consideration, we are to take into the estimate every valuable consideration received by the grantor. It is not necessary that they should move from the person claiming under the deed. From whatever source proceeding, they operate as legal considerations for the conveyance, and inure to his benefit. On this principle we are to estimate the considerations moving from John Taliaferro, jun., the trustee.

But it is objected, that the said John Taliaferro, a witness relied on by the appellees for the purpose of establishing the consideration, is incompetent, on the score of interest. If this objection be intended to apply to him as a necessary party to the cause, in his character of trustee, it is clearly unsustainable. There can be no question that a naked trustee is a competent witness. It may also be remarked, as a general principle, that courts, at present, receive objections to witnesses with great caution as they relate to their competency; and that they incline to refer them to their credibility. It is alleged, however, that the objections in this case are too strong to be overcome; for that he has a direct interest in the cause, because of the rent of six hundred pounds per annum, which, by the deed aforesaid, he became bound to pay; that the bill gave him notice that the deed was charged with fraud; that all payments made by him, since the bill, were made in his own wrong, and that he is liable to a decree therefor in this suit. That the rent, in case the deed shall be set aside, ought to be subjected to the claims of creditors, the court does not deem necessary to affirm or deny. But, if Taliaferro shall have actually paid the rents, either to Alexander or to his assignees, the court is of opinion that the said Taliaferro ought not, under the circumstances of this case, to be made liable therefor.

The institution of the suit, or the filing of the bill impeaching the deed of fraud, but containing no prayer that he should not pay the rent over, was not of itself sufficient to justify him in withholding the rent from those to whom he had contracted to pay it. All the parties interested in the rent were before the court; and if the appellant wished to enjoin the rent in the hands

of Taliaferro, the court of chancery was always open to him to apply for an order to that effect. For aught that appears in this court, the appellant might have preferred that the rent should be in other hands than those of John Taliaferro. His failure to obtain from the chancellor such an order as has been mentioned, especially when his bill was silent on the subject, left John Taliaferro at liberty to pay the rent to those who, under the deed, were entitled to receive it. And this remark applies with equal force to that portion of the rent to which James G. Taliaferro became entitled, and which he released in consequence of a surrender to him of a portion of the property on which the rent was reserved. It is not charged in this bill, nor established by proof, that there was any fraud practiced by Taliaferro in obtaining the lease, nor that the rent was inadequate. The reverse as to the rent is positively proved. In fine, the court does not perceive the weight of any of the objections to the competency of this witness.

John Taliaferro being thus decided to be a competent witness, is he credible? This is a question which the court is not disposed to argue. We doubt not that the counsel for the appellant, in the freedom and severity of his remarks on this topic, was urged by a sense of duty to his client, and actuated by a strong conviction that he was supported by the record. The view, however, which we have taken of the circumstances touching this point, is very different from that which presented itself to the appellant's counsel. We have examined the record patiently and minutely, and we have not seen that John Taliaferro has done anything that, considering the relation in which he stood to the parties, he ought not to have done. We perceive nothing that is calculated to cast a shade on his character; nothing to impeach his conduct as a man, or his credit as a witness.

The court is of opinion that the testimony in the cause shows that Alexander received valuable consideration, full and adequate, for all the property conveyed by the deed of the tenth of October, 1802; and that that deed, therefore, stands discharged from every imputation of fraud.

2. As to the deed bearing date the sixteenth of December, 1804. The considerations expressed are "natural love and affection," and "five pounds." What has been said, therefore, with respect to the deed of 1802, as to the propriety of admitting proof of further consideration than that expressed, applies with equal force to the deed of 1804. The considerations

proved are the release of Mrs. Alexander's right to all future support from her husband, and the relinquishment of her right of dower in all her husband's real estate, and the excess of the value of the property, which Mrs. Alexander once held, but which was sold by Alexander, over the value of the property previously settled on her; a portion of this property, however, being personal, had by the marriage become Alexander's, subject to his disposal and liable for his debts; it ought therefore, to be excluded in estimating the amount of the valuable consideration of the deed of 1804. And even when excluded, the court is by no means certain that the valuable consideration was not full and adequate.

Admit, however, that they were not full and adequate, it will not necessarily follow that the deed was *mala fide*, and fraudulent as to creditors; although the personal property brought by Mrs. Alexander to her husband, and sold by him, can form no part of the valuable consideration of a deed settling other property on her, yet it may and ought to be taken into view as a meritorious consideration of such deed; and the deed will be supported or set aside according to circumstances.

What are the circumstances of this case? It appears that Alexander, at the time of his marriage, was possessed of a magnificent estate. His wife brought him another, not much inferior. It appears that he was extravagant and prodigal in the extreme. To supply the demands of this prodigality, a sale of property became necessary. The personal property acquired by his marriage, he had a right to sell; and he did sell much of it. He prevailed on her moreover to consent to his selling the whole of her real estate, and she conveyed it accordingly; stipulating, however, that he should settle other lands upon her of equal value. He promised moreover to make a similar settlement of other property equal in value to the personal property which he had got by her, and which he had sold. These promises were partly performed by the deed of 1802, heretofore examined. In the latter part of the year 1804, he had become so intemperate in his habits, that his wife could no longer live with him, and she resolved on a final separation from him. This resolution received the concurrence of Alexander himself. In contemplation of this event, Mrs. Alexander agreed, as before stated, to relinquish all claim on him for future support and to relinquish her claim of dower in his real estate; in consideration whereof, and of former promises made by him in relation to her personal property sold by him as aforesaid,



Alexander agreed to convey, and did convey, for her benefit, the property embraced by the deed of 1804, which property, in addition to that conveyed by the deed of 1802, is proved to be of less value than the property, real and personal, which had been held by Mrs. Alexander in her own right, and which had been sold by her husband.

There is no proof in the cause that at that time, or even as late as the last of April, or first of May, 1805, Alexander was much involved in debt. It is not pretended that at that time he was otherwise than solvent. There is, on the contrary, positive proof that at that time, viz.: in April or May, 1805, he was not materially indebted; and that exclusive of the property conveyed by the said deed, and exclusive of as much more as would be sufficient to pay all his debts, he was worth a large estate. It is also proved by John S. Welford that after the first of May, 1805, he made a deed of gift to McFarlane and wife of ground rent in the town of Alexandria, amounting to about one hundred and fifty pounds for ever. The said John S. Welford, who had long acted as general agent of Alexander, and who declares himself well acquainted, in consequence of that agency, with his situation, expressly proves him to have been solvent as late as the month of February, 1806, when his agency terminated; and moreover declares his belief that if the claim of the appellant had been presented to him at any time during his agency (which agency was general and notorious in Fredericksburg and in Alexandria and their vicinities), satisfactory arrangements would have been made for its discharge. It is proved, also, that Mrs. Alexander did not permit Alexander to incur any further expense for her support, and that she relinquished, whenever required, her claim of dower to his real estate. Under all these circumstances, this court is not satisfied, as at present advised, that the said deed ought to be set aside as fraudulent, even as to a prior creditor of the said Alexander; and even, although a part of the consideration of that deed may not have been valuable, but meritorious only. But on this point the court gives no opinion.

But it is alleged, that the said deed has not been recorded within the time required by law, and that therefore although not fraudulent, it is void as to creditors. The deed is an exhibit in the cause. It bears date the sixteenth of December, 1804, and it appears by the certificate of the clerk, that it was not proved till the fifth day of September, 1805. It does not appear that the witnesses proved this deed otherwise than in

the usual form; it does not appear that they proved it otherwise than as a deed sealed and delivered on the day on which it bears date. Looking no farther than to the certificate of the clerk, we should be bound to say that it was not proved and recorded within the time required by law. But it is averred by the appellees, that the deed, although dated on the sixteenth day of December, 1804, was not in fact sealed and delivered till April or May, 1805; and they have taken depositions to prove the fact. It is contended, however, for the appellant, that whatever may have been the time of the sealing and delivery, yet if the deed bears date more than eight months before the time of proving it, and the record does not show that the witnesses proving the deed, proved that it was sealed and delivered within eight months before the time when it is fully proved and lodged to be recorded, it has no validity as a recorded deed, against a creditor.

This is a question of great importance, and the court has found it one of some difficulty. Its solution depends on the sound construction of an act of assembly prescribing a general regulation, *juris positivi*, merely. In such cases, the court has nothing to do with the hardship of the case, or even with the principles of abstract justice. It is a great hardship to the individual, that a fair purchaser of lands, for valuable consideration, shall lose the benefit of his purchase, because of unavoidable accidents preventing the attendance of his witnesses to prove his deed in the required time. Yet the case has frequently happened; and should the party complain of hardship, he would receive for answer, *ita lex scripta est*. The object of the legislature was to prescribe a general regulation, and to establish a criterion by which we may know, with greater certainty, who are the real owners of lands and tenements. For that purpose, the act of assembly, under which this deed was recorded, directs, that all conveyances of such property shall be by writing, sealed and delivered; and declares, that such conveyance shall not be good against a subsequent purchaser without notice, nor against any creditor, unless acknowledged or proved according to law, and recorded within eight months from the sealing and delivery thereof.

And as to all deeds of trust and mortgages whatsoever, they are declared to be void as to all creditors, and subsequent purchasers, unless they shall be acknowledged and recorded as aforesaid. A deed, it is admitted, takes effect from its delivery, and not from its date. The policy of the law, therefore (the

giving information as to the situation of the title to lands), would seem to require, that the time of delivery shall appear on the record. For how otherwise, can creditors, or others, know who are the real owners of land.

If a deed has a date, the law intends it to have been delivered at the date: 2 Inst. 674. When, therefore, a deed having a date, is proved by witnesses who say nothing as to the time of delivery, and is thereupon recorded, it stands recorded as a deed proved to have been delivered at its date; and if that date be more than eight months before it is lodged to be recorded, the deed although spread upon the record, is shown by the record itself not to have been recorded according to law; and is, therefore, not good as a recorded deed. It has been held in England that although a stranger is not concluded by an enrollment, but may aver that the deed was delivered at a day different from that which the enrollment purports, yet that the parties are concluded, and shall not be permitted to aver that a deed was delivered at a day since date; for, by the same reason it might be averred that it was never delivered: Comyn's Dig. 2 vol., pp. 66, 67, referring to Lavel's Re. 91; 1 Leo. 183; 2 Leo. 122; and Ow. 138. It is not necessary to decide that principle in this cause, and the court, accordingly, does not decide it. We mean to go no further than this to decide that a deed not lodged to be recorded until eight months after its date, and not proved by the witnesses, on whose testimony it was recorded, to have been sealed and delivered within eight months before it was recorded, is not good as a recorded deed. On this ground, we are of opinion, that the deed in the record mentioned, bearing date the sixteenth December, 1804, is void as to the appellant. The decree of the chancellor, is therefore reversed so far as it dismissed the bill as to that deed, and is affirmed as to the residue; and the cause is remanded, etc.

The court is of opinion that the deed of the tenth October, 1802, was executed *bona fide* for full, adequate, and valuable consideration, and stands discharged from every imputation of fraud. The court is farther of opinion that the deed of the sixteenth December, 1804, was executed *bona fide*, for considerations valuable and meritorious, without any intention to defraud creditors; but the court is of opinion that the said deed, not having been recorded within the time required by law, is void as to the appellant, a creditor of the grantor, Wm. T. Alexander. So much of the decree, therefore, as is in conflict with this opinion, is reversed, with costs, and the residue thereof is

affirmed; and the cause is remanded for farther proceedings to be had therein, according to the principles now declared.

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Cited in *Davis v. Davis*, 25 Gratt. 590, to the point that courts of equity are inclined to look with much indulgence upon settlements made in good faith upon wives, in consideration of the relinquishment of dower, or other property rights by them. It was there held that if such a settlement is found to be excessive, the court will not ordinarily set it aside, but will reduce it to a fair and just compensation for what the wife had parted with, and this principle was applied in that case. In *Doe v. Closs*, 1 McLean, 282, the principal case is referred to as holding somewhat different doctrine as to the necessity of the recording of deeds and other instruments within the statutory time.

As to proof of consideration, the decision is in harmony with later authorities: See note to *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 304.

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## CROUCH v. PURYEAR.

[1 RANDOLPH, 253.]

**DOWER IN COAL LANDS.**—It is not waste for a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins, or to penetrate through a seam already opened and dig into one lying under it.

**APPEAL** from an order of the chancellor dissolving an injunction obtained by the plaintiff against the defendants. The facts were: The plaintiff having purchased the interest of the heirs at law of John Ellis in certain lands assigned to the widow of the said Ellis as dower, upon which there was a mine of coal which had been worked to a small extent by the husband, filed his bill and obtained an injunction against the said widow, now intermarried with Puryear, defendant, and against McRae and Dorrington, who had obtained a lease of the dower land, restraining the said defendants from opening and working new pits and shafts upon said land, wasting the coal, it appearing that the said McRae and Dorrington were preparing to work the mine upon an extensive scale. McRae and Dorrington filed an answer, after the granting of the injunction, admitting that they were proceeding to take coal from the mine opened by the said John Ellis, and that for that purpose they meant to sink shafts, etc., claiming that as the lessees and representatives of the widow they were authorized to take coal from the said mine without stint; and that it is not waste to sink shafts or to pursue the coal belonging to the said mine, in every direction, and to every extent they may think proper to obtain the coal; they

admitted also that they were working a certain shaft opened after the death of Ellis by Puryear, claiming the right to do so, and asserting their belief that all the coal on the dower land was part of the same mine (they having no reason to believe that there was any other or distinct body of coal), and that the shaft on which they were working passed through the seam or vein opened by the said John Ellis in his life-time, and upon principles of law and common sense, a mine once opened is regarded everywhere, and that coal land being usually barren and sterile, to deprive the dowress of the free use of its mines, would be to take away all benefit of the endowment. The answer of Puryear and wife was to the same effect.

Upon motion of the defendants, the chancellor dissolved the injunction; being of opinion that the two seams or strata of coal are proved to be connected by a substance of slate and coal throughout, and should be regarded as forming the same mine, according to the understanding of the colliers in England and Scotland in like cases; and if so, the tenant for life, in right of her dower, might, upon common law principles, work the old shaft to every reasonable purpose, without stint; and upon the same principles, she might open new pits or shafts for that purpose.

From the order dissolving the injunction, the plaintiff appealed.

*Stanard*, for the appellant, contended: 1. That upon common law principles, the widow of Ellis and her lessees should be limited to the same use of the mine which Ellis made of it in his life-time, citing Co. Lit. 54, 56; 2. That she should not be permitted, either personally or through her lessees, to open or work any new veins, which it was contended they were doing, the two veins being separated by a *stratum* of slate, since mine and vein were synonymous terms, the former word applying simply to the *stratum* of coal which has been opened, citing *Stoughton v. Lee*, 1 Taun. 402.

*Call, Nicholas and Wickham*, for the appellees, contended that the word mine included the whole body or mass of coal contained in the land in question, and that it was not synonymous with "seam," and that the appellees were entitled to the free use of the mine to its fullest extent, citing *Claverling v. Claverling*, 2 P. Wms. 388; *Findlay v. Smith*, 6 Munf. 134 [8 Am. Dec. 733]. They contended further that the opening of new shafts was a benefit to the reversioner.

*W. Hay, jun.*, in reply, cited *Gibson v. Smith*, 2 Atk. 183, to show that unlimited working injures a mine, and consequently the reversion.

By Court, BROOKS, J. The decree should be affirmed.

GREEN, J., did not sit in this cause.

## CHOWNING v. COX.

[1 RANDOLPH, 306.]

**DEED OF TRUST AS MORTGAGE.**—Where a conveyance of real estate is made by a debtor to his creditor in trust to satisfy the debt out of the proceeds, it will be construed a mortgage, to which the right of redemption is incident; but if a sale is made under the deed, relief will not be granted against such sale, unless the purchaser is made a party to the suit.

**APPEAL** from the court of chancery.

The facts were: On the eighteenth day of November, 1803, an agreement was made between Chowning, the complainant, and Elizabeth Thompson, one of the defendants, for the sale and conveyance by the latter to the former of a certain tract of land for eight hundred and seventy-six pounds, a part of the consideration being that the said Chowning was to pay a certain debt of one thousand five hundred dollars due from the said Elizabeth Thompson to Peter Cox, the other defendant, secured by a deed of trust of the same land made by the said Elizabeth Thompson to the said Cox, dated August 8, 1801, the condition of said deed being that the said Cox should hold the said land in trust to secure the payment of the said debt. The complainant, however, alleged that at the time of making said agreement he understood the said deed of trust to be a mortgage, and nothing more. Chowning went into possession of the land under his agreement, and after having paid three hundred pounds eight shillings of the said debt due to Cox he was informed in 1806 that the title of Elizabeth Thompson to the premises was doubtful, whereupon he filed a bill and obtained an injunction against the said Elizabeth Thompson, Peter Cox, and another person, who claimed title to part of the premises. This injunction was afterwards dissolved, and the said Cox then proceeded to make sale of the premises under the deed of trust to satisfy an unpaid balance on the debt secured thereby. At this sale one Taylor purchased the land, for six hundred and twenty-six pounds, whereupon

Chowning commenced this suit against Cox and Elizabeth Thompson, to have the said deed of trust declared a mortgage, because no one was named therein as trustee to act impartially between the debtor and creditor, and the trust was uncertain and equivocal, there being no covenant in the deed on the part of Cox, to receive payment from the grantor and release or reconvey the premises; and the complainant asks that the sale be set aside and he be admitted to redeem, etc. At the hearing before the chancellor, both defendants having duly answered, it was ascertained that the unpaid balance of the debt to Cox was two hundred and seventy-two pounds thirteen shillings and eight pence. The chancellor decreed that the complainant's bill, so far as it prayed relief against the said sale, be dismissed; that he and his heirs be forever barred of any claim to the said premises; that out of the purchase-money received at said sale the said Cox retain the balance due him; that he pay to the complainant two hundred and fifty-three pounds sixteen shillings and three pence, with interest from the twenty-ninth day of May, 1812; and that he pay to Elizabeth Thompson one hundred and twenty pounds, with interest from January 1, 1804, he having already paid her four hundred dollars since the sale. From this decree Chowning appealed.

*Wickham*, for the appellant.

*Leigh*, for the appellee.

By Court, CABELL, J. This case presents the general questions, whether a deed executed by a debtor, conveying land to his creditor, and purporting to constitute him the trustee for selling the land, and applying the proceeds of sale to the payment of the debt due to himself, can be regarded otherwise than as a mere mortgage, to which the right of redemption is incident; or, in other words, whether a creditor thus constituted a trustee can, by the mere authority derived from the deed, and without resort to a court of equity, sell the lands so as to bar the rights of the debtor, and those claiming under him.

Where a third person, disinterested and indifferent between the parties, is constituted the trustee, it cannot now be questioned that he possesses the powers claimed for the creditors in this case. We do not mean to insinuate that the court has gone too far in confirming these powers, and in sanctioning the summary proceedings to which they give rise; but we are of opinion that it has gone far enough; that it has gone as far as the purposes of convenience and justice require; and that it cannot ge

further without opening a door to fraud and oppression. Although there is no decision which bears expressly on the point before us, yet the principles frequently declared in relation to the powers and duties of trustees in general, are utterly incompatible with the due exercise of those powers and duties by the creditor.

Some of these principles will be found declared in the case of *Lane v. Tidbal*, Gilmer, 130. It is there said among other things, that a trustee, in a deed of trust, is to be considered as the agent of both parties; and that he ought to act impartially between them, etc. It is surely not necessary for the purpose now before us, to proceed further in the enumeration. It must frequently happen, that the time, the place and the manner of selling, will present questions of serious difficulty and of great importance to the parties. The sum really due at the time of sale may also admit of much controversy. On all these points, as well as many others that might be mentioned, the interests of the parties may be, and frequently are, at direct variance; and to refer them, for adjustment, to the will of one party only would be contrary to the clearest principles of natural justice. That any man should execute a deed conferring such powers, with a belief that the deed will be obligatory on him, affords another proof of the maxim that the borrower is a slave to the lender. This is one of those cases in which it becomes necessary to protect men from the effects of their own folly or imprudence.

We are all, therefore, of opinion that the deed in the record mentioned, did not give the power to sell the lands so as to bar the right of redemption.

In pronouncing this opinion, we wish to be understood as confining ourselves to the case before the court, which is a case of real property. How far the same principle may or may not be applicable to a case of personal property, we wish to be understood as giving no intimation. On these principles, if there were no other persons than the debtor and creditor interested in this controversy, the court would not only reverse the decree, but provide for a sale under the directions of the court of chancery. But the person who purchased under the former sale, and who has the legal title, has not been made a party. Had he been before the court, he might have given a different aspect to the cause. He might have shown that although the sale cannot be justified on the sole ground of the powers derived from the deed, yet it ought to be confirmed



in his favor, in consequence of the subsequent acts of the appellant. He ought, therefore, to have been a party; and the chancellor erred in pronouncing a final decree, without affording an opportunity to bring him before the court.

It is proper to observe that if the decree were free from the objection aforesaid, we should still have to reverse it for error against the appellee, Cox. The decree is erroneous, even on the principles on which it professes to proceed. The land sold for six hundred and twenty-six pounds, there was due to Cox the sum of three hundred and seventy-two pounds and three shillings and nine pence, which he is directed to retain. Of course, he ought not to have been subjected to pay more than the balance, viz.: two hundred and fifty-three pounds sixteen shillings and three pence. Yet he is decreed to pay that balance to the appellant, and the further sum of one hundred and twenty pounds to the appellee, Thompson, with interest from January, 1804.

The decree is, therefore, reversed, and the cause remanded for further proceedings, pursuant to the principles now declared.

BROOKE, J., was absent from indisposition.

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### TAZEWELL v. SMITH.

[1 RANDOLPH, 313.]

**VESTED INTEREST UNDER WILL.**—Where a testator directs his real estate to be sold, and the money arising therefrom to be paid to particular persons, the interest of the legatees is a vested one, as much as if the land itself had been devised, although the executor may have a discretion as to the time of selling, and although the estate to be sold is only a remainder.

**IDEM—DEATH OF DEVISEE.**—The death of the devisee of such vested interest, before sale, will not defeat the interest, unless so provided in the will.

**LAND CONSIDERED AS MONEY.**—Where land is directed to be sold; equity will treat it as money, unless some one, having a right so to do, elect to take it as land.

**APPEAL** from the court of chancery, in a suit originally brought by Larkin Smith and Sophia Ann, his wife, against the executor and heirs at law of Benjamin Taliaferro, to recover a portion of the estate of the said Taliaferro. The facts were: The estate in question was the undivided half of an estate formerly owned by Richard Taliaferro, the father of Benjamin, who devised the same to his wife Rebecca, during her widowhood; to be divided, upon her death or marriage, equally

between his sons Benjamin and Robert. Benjamin Taliaferro, having intermarried with the complainant, Sophia Ann, died leaving two infant children, Richard Henry and Henry T. By his will, after providing for his wife, he directed his executors (the said Sophia Ann and Littleton W. Tazewell, defendant, the latter of whom alone acted as executor,) to sell the residue of his estate "of what nature or kind soever, whether in possession, remainder or reversion, at any time and in any manner he or they shall think proper." The will then proceeded: "And it is my will and desire, that the money arising from the sale of my property abovespoken of (after payment of my just debts,) may be laid out by my executors, or such of them as shall act, in any manner they may think most advisable, so as to produce a certain annual income; and it is my will and desire that this annual income may be equally divided between my two sons, Richard Henry and Henry Taliaferro, each and every year, until either of my said sons attains the age of twenty-one years, or marries, at which time I desire that one moiety of the principal may be assigned and transferred to him; in like manner as the other moiety is given to his brother; but should either of my said sons die before he attains the age of twenty-one, or marries, then it is my will and desire that the other should succeed to his proportion."

Richard Henry and Henry Taliaferro both died under age and unmarried, in the life-time of Rebecca Taliaferro, the widow of Richard Taliaferro, who was in possession of the estate, and who died shortly before the commencement of this suit, without having married a second time. No partition was ever made between Benjamin and Robert Taliaferro or their heirs, nor did the executors of Benjamin ever execute the power of sale contained in his will.

Sophia Ann having intermarried with Larkin Smith, claimed the estate as heir at law of her deceased children, Richard Henry and Henry Taliaferro. The complainants claimed that as they alone were entitled to the proceeds of the estate, in case it had been sold under the will, they had a right to elect to take it as land, and discharge the executor from the duty of selling. They therefore asked that Tazewell, the executor, be directed to deliver up the estate to them, and to release all right, title and interest in the same.

Tazewell, the executor, in his answer, alleged as the reason for not selling, that he did not think it safe to do so, owing to the conflicting interests, and to uncertainty of value, arising

from its not being an estate in possession prior to Rebecca's death. He professed his willingness to abide the directions of the court in the premises.

The heirs at law of Benjamin Taliaferro in their answer contended that as the estate was acquired by Richard Henry and Henry Taliaferro by purchase from their father, it should descend in the paternal line, and that under the circumstances of the case it should be considered as real and not personal estate, and that they were entitled thereto.

The suit having abated, first by the death of Sophia Ann, and afterwards by the death of Larkin Smith, was revived in the name of the administrator *de bonis non* of the said Sophia Ann.

The chancellor decided that the land having been directed to be sold, should be regarded as personal estate, and that Sophia Ann, having survived her two sons, although she died in the life-time of her last husband, her personal representative was entitled thereto, and the profits thereof, first for the benefit of her creditors, and then to the use of those claiming under her late husband, Larkin Smith. He therefore directed an account to be taken of the rents and profits, and also of the administration of the estate of Benjamin Taliaferro, and appointed commissioners for the purpose of making partitions and sales of the said land. From this interlocutory decree the defendants took an appeal.

*Leigh and D. Robertson*, for the appellants, cited: *Durour v. Motteux*, 1 Ves. 320; *Ackroyd v. Smithson*, 1 Bro. C. C. 500, 510, 511; *Cruse v. Barley*, 3 P. Wms. 22, and Coxe's note; *Chitty v. Parker*, 2 Ves. jun. 271; *Berry v. Usher*, 11 Id. 87; *Duke of Chandos v. Talbot*, 2 P. Wms. 612, and Coxe's note; Co. Lit. 237, a., Hargrave's note; 8 Ves. jun. 235; 2 Bro. C. C. 589.

*Stanard and Wickham*, for the appellee.

By Court, CABELL, J. The first question which presents itself in this case, admitting that all necessary parties are before the court, is, whether the interest intended by the will of Benjamin Taliaferro for his two sons, Richard Henry and Henry Taliaferro, were vested and continuing interests at the time of their deaths.

This question presents no difficulty. It is clearly a vested interest, unless a different result be produced by the testator having left the time of selling to the discretion of the executor. In every instance of a sale by an executor, some time must of

necessity elapse between the death of the testator and the sale; and something is almost invariably left to the discretion of the executor as to the time of selling. Yet that makes no difference where, as in this case, the direction to sell is imperative. It has never been doubted that the devisee or legatee for whose benefit a sale is thus directed, takes by the will an immediate vested interest; nor has it ever been held that the death of the devisee or legatee before the sale defeated that interest, unless there was some provision in the will to that effect. Under such circumstances, the interest in the proceeds of the sale is as much a vested interest as if the land itself had been immediately and directly devised to the devisee. The circumstance in this case that the testator had only a remainder in the land, expectant on the death of his mother, will not vary the construction in this particular, which ought to be given to the will. He was well informed of his interest in this land, and yet he expressly subjects to sale all his estate, whether in possession, remainder or reversion. He may have been aware that circumstances might, by possibility, render it essential to his children that the sale should be made before the life-estate might fall in; and he very prudently left the time of the sale to the discretion of the executors.

The interests, therefore, intended for the children of the said Benjamin Taliaferro, vested at his death; and there being nothing in the will to defeat them, they were continuing interests at the deaths of the children.

It becomes important to inquire, in the next place, what was the nature and character of those interests? It is an established principle, "that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted." The English reporters abound with cases on this subject; and there is no part of the law more firmly established, or better understood. The important question in such cases is, whether the character of land or money is definitely and imperatively affixed by the will to the property; for the character thus impressed upon it will remain so impressed, until some person having a right to elect, elects to take it in its original character: *Ashby v. Palmer*, 1 Meriv. 296; 2 Madd. 108, 109, 110, and the cases there cited. Land, therefore, thus impressed with the character of money will, until election be made to take it as land, pass as money, although it has not been actually converted into money. The

counsel for the appellants relied upon the principle laid down in *Walker v. Denne*, 2 Ves. 170, that the property will pass according to the state in which it happens to be at the death of the person from whom it is claimed. But that principle has been repeatedly overruled: *Wheldale v. Partridge*, 8 Ves. jun. 227; *Biddulph v. Biddulph*, 12 Id. 161; *Kirkman v. Miles*, 13 Id. 338; *Ashby v. Palmer*, 1 Meriv. 296. The other cases relied on by the counsel for the appellants have no application. In all of these there was, from some cause or other, a resulting trust, in whole or in part, for the heir at law of the testator. But in the case before us, the conversion into money is imperative, "to every intent, out and out;" and the whole proceeds of the sale, after payment of debts, are given as personal property to the two sons of the testator; and it is to them, or the survivor of them, that the succession must now be made. There is, then, no foundation whatever for any claim on the part of the heirs at law of the testator.

If there were no persons other than the present parties, who might claim an interest in this controversy, the court, pursuing the principles above declared, would affirm the decree of the chancellor.

But it appears that after the death of the two sons of the testator, Benjamin Taliaferro, their mother, to whom the property in controversy had passed at the death of the survivor of them, as his next of kin, intermarried with Larkin Smith; and the said Smith and his wife instituted this suit, as the only persons interested in the sale of the land, claiming, by their bill, to discharge the executor from the necessity of selling, and electing to take the land itself. If this election had any operation in favor of the wife, in restoring the land to its original character, as land, it may become important to her heirs at law, as she died before the termination of the suit, and before the land was reduced to possession by the husband, to inquire whether her rights therein descended to them. On this point the court expresses no impression even, further than to say, that it is a subject on which the heirs at law ought to have an opportunity to be heard before a final decree. The decree is therefore reversed, with costs to the appellees, as having substantially prevailed; and the cause is remanded to the court of chancery, with directions to make the heirs at law of Mrs. Smith, parties.

BROOKS, J., did not sit in this cause.

## THWEATT v. JONES.

[1 RANDOLPH, 328.]

**CONTRIBUTION IN EQUITY.**—When an obligation or duty rests upon several persons, *equali jure*, and to be borne equally by them, and one of them is compelled to pay a judgment obtained against him for non-performance thereof, he is entitled to contribution from the others in equity, if there has been no fraud or voluntary wrong in such failure to perform; but he must show that he is innocent of such fraud or wrong. Accordingly, one tobacco inspector may claim contribution from a co-inspector, after having paid a judgment obtained against him for non-delivery of tobacco, upon showing that the claim does not arise *ex maleficio*, but not otherwise.

THE opinion of the judges state the case.

*Leigh*, for the appellant.

*Gilmer*, for the appellee.

GREEN, J. The appellant filed his bill against the appellees in the superior court of chancery for the Richmond district, charging that Thweatt and Hinton were joint inspectors of tobacco at Bolling's warehouse; that after Hinton's death, Brunett brought an action on the case against Thweatt, as surviving inspector of Thweatt and Hinton, for the value of tobacco inspected at the said warehouse, and not delivered according to the tenor of the receipt, and obtained a judgment therefor, which was paid by Thweatt's administrator, amounting, with costs, to thirty-one pounds nine shillings and ten pence. A copy of the record of the suit at law is exhibited as a part of the bill. The bill further charges that Adam Finch brought a suit (an action on the case) against the said Thweatt and Hinton, the foundation of which was the non-delivery, by the said inspectors, of other tobacco inspected at the said warehouse, to the "said Finch, or his order," in which he recovered ninety-six pounds fifteen shillings and two pence, and costs, against Thweatt; the suit having abated as to Hinton, by his death; that after an unsuccessful appeal and injunction, Thweatt's representative had paid the whole or great part of the judgment, damages and costs. A copy of the record in Finch's case is also exhibited with the bill as a part thereof. The bill also states that the plaintiff "has been advised that for a moiety of the said judgment, and costs and damages, the estate of Hinton should be responsible, inasmuch as the recoveries were for a joint malversation in office." Joseph Jones styling himself, in his answer, to be administrator of S. Hinton,

deceased, late inspector at Robert Bolling's warehouse, in the town of Petersburg, answered. The answer does not admit or deny the matter of the bill. The record in Brunett's case shows that the suit abated Thweatt, by his death, and was revived against his representative, against whom the verdict and judgment was rendered; and that the tobacco was inspected, and receipts given, by Thweatt and Hinton; and that the demand and failure to deliver, was in the life-time of both, and whilst they were inspectors. The declaration in Finch's case charges that the defendants Thweatt and Hinton had not only failed to deliver the receipts for the tobacco inspected, to Finch, but had delivered the receipts and tobacco to another person, not authorized to receive the same. The chancellor dismissed the bill, and the plaintiff appealed.

The bill in question was a bill for contribution, and the case depends entirely upon the question, whether the bill presents a fit case for contribution, or not? The counsel for the appellant seems to think that this question would turn upon the inquiry, whether the actions of Brunett and Finch would, or would not have survived against the representatives of the inspectors, if they had both died before a recovery had; and he contended that those acts or actions in some other form could have been maintained against the representatives of the inspectors; either, because the inspectors were bailees, and bound by an express contract of bailment to deliver the tobacco to the owners; for a failure in the performance of which contract, an action of *assumpsit*, founded upon the contract, would lie against the executor of the bailee; or, because our statute provides that an action of trespass may be brought by or against executors or administrators for goods taken and carried away away in the life-time of the testator or intestate.

I doubt whether an action of *assumpsit*, founded upon the contract (in which the contract is the gist of the action, and therefore, may be brought by, or against an executor), could be sustained against the inspectors. They are public officers. They have no reward for their services in relation to the crop-tobacco brought to the warehouse, other than a fixed salary, which they receive from the commonwealth. In case of the death, removal, or resignation of an inspector, his care and responsibility, in relation to the tobacco, devolve on his successor; and neither he, nor his executor, has any control over the tobacco in the warehouse, so as to be enabled to comply with the supposed contract of bailment. Inspectors are liable,

by the provisions of the act of assembly, to the parties aggrieved by their misconduct, for various specified penalties, and for damages arising from their failure in, or neglect of duty. In short, the commonwealth seems to be the bailee (but without responsibility as such), and the inspectors her agents and officers. To maintain an action of *assumpsit ex contractu*, it is necessary to aver and prove a consideration; otherwise, the promise is *nudum pactum, unde non oritur actio*. What consideration could be alleged to exist, between an inspector and a planter, carrying his tobacco to a warehouse for inspection and safe keeping? It is true, that a special action of *assumpsit* (as it is called, though it be really an action *ex delicto*), may be maintained against a bailee, who, without consideration, undertakes anything in relation to another's property, and performs his undertaking so unskillfully and negligently, as to produce a damage to the owner. But, in such case, the damages are recovered for the malfeasance, or negligence of the bailee, which is the gist of the action. The undertaking indeed, must be alleged and proved; but, it is nevertheless, only a matter of inducement. Such an action, therefore, could not be maintained by or against an executor, it being *actio personalis quae meretur cum persona*; unless it be given by our statute.

It has been decided under the statute of 4 Ed. III, ch. 7, that an executor may maintain an action for any injury done to his testator's personal estate, by which it has been rendered less beneficial to the executor. Because, the title of the act (which is in the terms of an enacting clause), says: "That an executor shall have no actions for a trespass done to their testators, as of the goods and chattels of their testators taken and carried away," etc., and enacting, "that the executors in such cases, shall have an action against the trespassers," etc. In the construction of this statute, it has been decided, that the word trespass, as it was then understood, embraced all cases of tort; that the word wrong in the title is general, and that the words, as of the goods, etc., were inserted only by way of example, so as to confine the remedy to cases in which the wrong affected the goods and chattels. But, our statute, without any such title or general words as are found in the title, and in the enacting clause of the English statute, gives the action of trespass for goods taken or carried away, and provides for that case only substantively, and not by way of example. So that I should doubt, whether any action would lie against an executor for a tort by his testator, unless it were shown that goods had



been taken or carried away by him. I have not, however, thought it necessary to examine those questions minutely, because they seem to me unimportant to the decision of this case. If, however, it were necessary to show that Hinton's representatives were responsible to the owners of the tobacco, notwithstanding his death, that responsibility is fully ascertained by the case of *Scott v. Hardaway*, 4 Muf. 263, in which it was decided in this court, that an inspector was liable, on his official bond, for any injury suffered, by any person, in consequence of his misconduct.

Contribution is not due, by reason of any contract, express or implied. But, when any burden ought, from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is in *æquali jure*, contribution is due, unless the claim to contribution has arisen out of some actual fraud or voluntary wrong, in which the party claiming contribution has participated. The mere non-performance or violation of a civil obligation is not such a wrong as will condemn a claim to contribution: 1 Ves. & B. 117. The act which precludes a party from the right to claim contribution from those who are equally liable to the burden as himself, must be *malum in se*, as actual fraud or voluntary wrong. Thus, if there be a common partition-wall between two co-terminus tenants, and it becomes ruinous, and one, in spite of the prohibition of the other, pulls it down and rebuilds it, he is entitled to contribution for the expense: 4 Johns. Ch. 334 [*Campbell v. Mesier*, 8 Am. Dec. 570]. Thus, if the connusor dies, having sold a part of the lands bound by the recognizance to several purchasers, and leaving a part to descend to his heir, the heir is not entitled to contribution against the purchasers, because he is not in *æquali jure*; but the purchasers are, without contract, express or implied, entitled to contribution against each other, without regard to the time or order of the purchases. So, "if judgment be against two disseisors in assize for land and damages, and one disseisor dies, the execution shall not be awarded against the surviving disseisor, who was party to the wrong, but as well the heir as the disseisor shall be charged: 3 Co. 13; and *a fortiori*, if the surviving disseisor had paid the damages, he ought to have contribution against the representative of the deceased disseisor.

The reason why the law refuses its aid to enforce contribution among wrong-doers, is that they may be intimidated from committing the wrong by the danger of each being made responsible

for all the consequences; a reason which does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties. Courts of law enforce contribution only in cases where a contract between the parties to that effect may be presumed; but courts of equity indulge in a larger jurisdiction, and admit contribution whenever the parties were originally subject, jointly, to the burden, and are in *æquali jure*, and where the party claiming the assistance of the court is not precluded by his own turpitude from receiving it: 4 Johns. Ch. 384 [*Campbell v. Mesier*, 8 Am. Dec. 570]. In the case at bar, the only default of the inspectors appears to have been the non-delivery of the tobacco to the owners of it. This might happen in various ways, without imputing fraud or voluntary wrong to the inspectors. It might have been delivered, as is stated in the evidence given in one of the suits at law (which is, however, no evidence against the defendants in this suit), in consequence of the notes or receipts having been delivered to a person producing a forged order. It might have been delivered to an improper person, by mere mistake, or stolen; and, in the absence of all proof, although it might have been embezzled by the inspectors, such embezzlement ought not to be presumed. Fraud is odious, and ought to be proved. Nor do I think that this conclusion ought to be affected by the statement in the bill, that the judgments were recovered for a joint malversation in office. That is a loose expression, corrected by the context of the bill, and by the records of those judgments, which exhibit nothing inconsistent with the supposition that the tobacco was lost to the owners by a fraud practiced upon the inspectors, or by their mistake.

The case seems to me to resolve itself into these propositions: When parties are equally bound to bear a burden, and are in *æquali jure*, that is, liable from the same circumstances existing as to both, contribution is due of right, in equity; that this general proposition is liable to one exception, namely, that the party who would otherwise be entitled to such contribution, forfeits such right if the joint liability arose from an act *malum in se*, a fraud or voluntary tort, in which he participated; that when it is shown that the parties were originally equally bound, and stood in *æquali jure*, the party who has paid all is entitled of course to contribution, unless it be shown on the other side that his right has been forfeited as aforesaid, by his own wrongful act. No such fact is alleged or proved in this case.

I do not think that the right to contribution ought to be con-

aided as impaired by the fact (if it really existed in this case), that one of the parties and his estate was absolved by his death from all liability to the party injured. He who claims contribution, does not claim by substitution to the rights of the party whose demand he has satisfied; but upon the broader principle that he who has exclusively borne the burden which ought to have been borne jointly with another, is entitled to be ratably indemnified, as in the case of party walls, and average in cases of loss at sea, etc. I presume, though I have seen no case to that effect, that if two were bound in a joint obligation before our statute concerning joint rights and obligations for a joint debt or contract, and one of them had died, and the other had discharged the obligation, he would have been entitled to contribution against the executors of the deceased obligor, although they were at law completely exonerated. I think the decree should be reversed, and the plaintiff declared to be entitled to recover against the defendants a moiety of the judgments, costs and damages paid by him or his predecessors.

COALTER, J. This is a bill for contribution, filed by the appellant against the appellee. It is alleged that their intestates were many years ago co-inspectors of tobacco at Bolling's warehouse in Petersburg, and that two judgments had been recovered, one against Thweatt, in his life-time, and one against the appellant, as his administrator, for breaches of duty in office, alleged to have taken place in the life-time of both the inspectors.

As a reason for resorting to a court of equity, instead of going to law, the bill alleges that the appellee had delivered over the assets of his intestate to the distributees, who are made parties, and a discovery of assets is therefore required. In other respects, it is a naked bill for contribution between two officers, against one of whom there had been judgments at law for a failure and refusal to deliver tobacco in one case, and notes in the other to the owners; and it is claimed in the bill on the mere ground as is alleged, that the recoveries at law were for a joint malversation in office; the whole, or a great part of the damages recovered for which, had been paid by the appellant out of his intestate's estate. It is, therefore, as naked a case in equity, as a declaration on an implied *assumpsit*, arising from the mere payment of the money by one inspector, would be at law; and the question is, whether, in such a case, contribution can be decreed between two such wrong-doers; admitting that both are proved to be so.

It is said, however, that though the bill expressly alleges that the recoveries at law were for a joint malversation in office, yet if we take the records of those judgments as part of the bill, they being referred to as part thereof, that the case will appear to be one in which contribution can properly be decreed, without violence to the general principle of law which repels such claim between wrong-doers.

One of these suits was instituted against both inspectors; it abated by the death of Hinton, and judgment finally obtained against Thweatt, who survived.

It is an action on the case for a violation of the duties in their office, in not delivering tobacco notes to the owner of tobacco inspected by them; and on the plea of not guilty, there is a verdict and judgment for the plaintiff.

In this case, the defendant moved for a nonsuit, because the evidence introduced by the plaintiff, was not sufficient to support his action. The evidence was, that the son of the plaintiff, by his directions, applied to the inspectors for his notes; that the defendant showed him the books, by which it appeared, the tobacco had been inspected, but was told it had been shipped, the inspectors alleging they had issued notes for it, in pursuance of an order in the name of the plaintiff, which order they showed, but which the witness told them he knew was not the handwriting of the plaintiff. That the witness afterwards produced a written order from the plaintiff for the notes, but they were refused.

Even if this evidence was against the appellee in this case, as far as it goes, and if full proof, that the inspectors had been defrauded of the tobacco, would justify a decree for contribution, yet the proper evidence is not produced, nor is there an allegation in the bill, to justify its exhibition, unless this statement in the record, is to be taken as such allegation. The alleged forged order is neither produced on the trial at law, nor is it exhibited in this suit; nor is it stated who provided it or received the notes, or what has been done with the tobacco. If it was shipped, the books directed to be kept by the forty-eighth section of the act, would show by whom, and probably who was the inspector who delivered it out.

The bill alleges that there had been an injunction to this judgment, which had been dissolved; but on what ground it was granted, whether on account of this order or not, is neither stated, nor are the proceedings in that case made part of this, if it would be evidence in this case.

The other suit was likewise an action on the case against Thweatt, instituted after the death of Hinton, alleging that they jointly issued tobacco notes; that in the life-time of Hinton, the tobacco was demanded, and not delivered; and that after his death it was again demanded of Thweatt, who continued in the office of inspector, and who, fraudulently and contrary to law, refused to deliver it. To this there was also a plea of not guilty, and a general verdict, and judgment for the plaintiff.

It was not necessary for the plaintiffs in these suits to prove an actual embezzlement of the tobacco in order to entitle them to recover; a delivery into the warehouse, and a refusal of the notes in the one case, and of the tobacco in the other, was sufficient. Such proof made the inspector a wrong doer, as to the plaintiffs, and subjected them to their action; but, for aught that appears to the contrary, actual fraud or culpable neglect may have been proved as to the defendant.

I can discover no ground, therefore, on which I can consider this case, otherwise than as a naked one of contribution, sought between public officers, in consequence of damages recovered, and paid by one of them, for a joint malversation in office, even if it had not been expressly so called in the bill itself. I am not at liberty to make anything else of it, because nothing else is stated, much less proved. I cannot say the notes in the one case were issued in consequence of a forged order, or the other tobacco taken from the warehouse, on the production of forged notes; or that it was stolen, or otherwise taken, without gain to the inspectors, or either of them, and that they have lost it without any culpable neglect in either; nor am I prepared, as between public officers of such trust and responsibility, to say, how far motives to vigilance and attention should be lessened by a decree for contribution in such case, were made out. The general doctrine is, that even between private individuals, there is no contribution between joint wrong-doers. It is not for me to say that these parties are not to be considered as wrong-doers, unless embezzlement or culpable neglect is proved in this cause. It is not to be expected that either party would prove this in both, and of course, in himself; and then it must result that contribution will lie in all cases of this kind, unless the verdict which has found the wrong as to the third party is considered conclusive, until the party claiming it can make out a proper case for contribution, notwithstanding such verdict.

The parties will try each to criminate the other, so as to throw

the whole burden from himself; but it cannot be expected that a defendant in such case will try to fix guilt on both, otherwise than as it is established by the verdict. And the court itself, from motives of public policy, will notice that. This doctrine, I think, is already laid down in *Merriveather v. Nixon*, 8 T. R. 186. That was an action on the case against two, for an injury done to the reversionary estate in a mill, in which was a count, also in trover, for the machinery. In that case, too, there was a joint judgment, so that both were found guilty. The whole sum was levied on one, who brought his action for contribution. The judge was of opinion that no contribution could by law be claimed, as between joint wrong-doers; and that, consequently, the action on an implied *assumpsit* could not be maintained on the new ground, that the plaintiff had alone paid the money; and he nonsuited the plaintiff. On a motion to set this aside, Lord Kenyon said he never heard of such an action being brought, where the former recovery was for a tort.

There being no judgment establishing a wrong against Hinton, and what defense he could have made we know not, it must be like a case where a party injured sues one, for he is not obliged to sue all, guilty of a wrong; if that one comes for contribution against others, he surely must make out a case which will justify a recovery against them. The mere judgment against him and payment is not enough.

There is no verdict establishing guilt of any kind on the appellee's intestate; he might have been sick during the whole time the tobacco was in the warehouse, or absent during the delivery, and have been protected by the provisions of the eleventh and fifteenth sections of the act. In the absence of a verdict then, to convict him of any wrong or liability, or any proof of such liability, I cannot say that, because one has been found liable, the other must of necessity be so too; and although a joint malversation, although it is charged in the bill, there is no proof that the intestate of the appellee was even an inspector, much less that he had anything to do with the tobacco in question, other than what is to be found in the declarations in the actions at law, and the evidence spread on the record, when Hinton was dead, and no longer a party to the first suit. The answer of his administrator says nothing as to these matters, otherwise than calling himself administrator of Hinton, late inspector, but is confined to the discovery of the assets sought of him.

I cannot think that the relation between these parties, as in-

spectors, is a ground whereon to relax the sound principle of law above insisted on. It would seem to me the reverse; and that it might tend to encourage negligence, if not fraud by inspectors, to hold out a hope, that if matters come to the worst, the burden will be divided. On the contrary, this court has decided that the vigilant inspector may throw the whole burden on the fraudulent one, and even hold his securities bound therefor: 4 Munn. 262. They give separate bonds, and each is severally liable for his own improper acts. If both are fraudulent, or both negligent, so that no case can be made out by either, so as to throw the whole or part of the burden on his fellow, which proper vigilance will generally enable him to do, I think it safest to let them abide by the consequences.

I am, therefore, for affirming the decree.

CABELL, J. The new lights thrown on this case by the second argument have convinced me that my first views were erroneous. I take pleasure in abandoning them. It is admitted to be an universal principle that where two or more persons have jointly committed a tort, no court of justice, either of law or equity, will interfere to enforce contribution among the participators in the tort. But this principle has never been held to extend to the non-performance of a contract; nor even to the non-performance of a civil obligation or duty, where that non-performance does not proceed *ex maleficio*: *Lingard v. Bromley*, 1 Ves. & B. 114.

Although inspectors may not, strictly speaking, be considered as bailees, yet I can perceive no objection to the positions maintained by the counsel for the appellant, that in determining the liability of inspectors to individuals, whose tobacco they have received, we are to be governed by the same principles which regulate the liabilities of ordinary joint bailees to persons whose property they have received, or a contract of bailment. The duties of inspectors, in relation to persons whose tobacco they receive, resulting either from the general provisions of the act of assembly on the subject, or from the special written contracts, exhibited in the receipts or notes given by the inspectors, do not vary in character from the duties of ordinary bailees, growing out of a common contract of bailment. And, if there be a joint failure in two or more bailees to comply with a contract of bailment, which failure does not arise *ex maleficio*, I hold it to be clear law that one of them, who may have been compelled to pay all the damages

recovered, may resort to the others for contribution. If it were otherwise, it would produce great injustice.

If it be said that the idea of a contract ought to be excluded in the consideration of this case, for that inspectors are public officers, and that consequently their duties spring from official obligation, and not from the terms of a voluntary contract, I reply that there is no difference, in my opinion, between duties resulting from a voluntary contract and duties resulting from an office which a man has voluntarily accepted. And even if there be a difference, the general principles established in the case of *Lingard v. Bromley*, before referred to, apply with full force to the case of joint inspectors.

It is objected, however, that the complainant's case, as exhibited by his own bill, does not entitle him to relief, even on the principles above stated. The bill alleges that the judgments, as to which contribution is sought for, were obtained for the failure to deliver tobacco which the inspectors had received for inspection. And it is now objected that this failure may have proceeded *ex maleficio*; but it is equally probable that it did not, and in such case, I do not hold myself at liberty to presume that the failure proceeded from embezzlement, fraud, or even culpable negligence, on the part of the inspectors, or either of them, until it shall be proved, especially when we know that they act under the solemn obligations of an oath. It would be to invert the order of evidence to require from them, or either of them, proof of the non-existence of such embezzlement, fraud or negligence. The *onus probandi* is on him who maintains the affirmative of the proposition. As to the expression in the bill, "joint malversation in office," so confidently relied on by the counsel for the appellees, it is to be remarked that it forms no part of the *allegata* of the complainant; and it would be too strict, for a court of equity, to hold a man bound to technical accuracy of expression, in unimportant parts of his bill.

I, therefore, think the decree should be reversed, and the cause remanded for further proceedings, pursuant to the above principles.

BROOKS, J. The single inquiry in this case is whether a joint-inspector of tobacco who has been compelled by judgments at law to pay damages for failing to deliver inspected tobacco can have contribution against the representative of his co-inspector, without alleging in his bill and proving, that the failure to deliver the tobacco was produced by some inevitable



circumstance, or other cause exempting the inspectors from the charge of refusing to deliver the tobacco, when legally demanded. I suppose this to be the inquiry in the case, because, if a case is really made out, in which the failure to deliver the tobacco proceeded from no default of the inspectors, I am inclined to think the plaintiff would be relieved, whatever may have been the form of the action at law in which the judgments were rendered. The bill, I think, exhibits no such case, and the proofs in the record furnish no aid to supply its defects.

If the rule that the *allegata* and *probata* must correspond could be dispensed with as to one of the cases, it alleges that the suit was prosecuted against the plaintiff's intestate for the failure to deliver tobacco inspected agreeably to the tenor of the receipt for exportation, and that the foundation of the other suit was the non-delivery of other tobacco, the authority to receive, which is not denied to the party demanding it, and it concludes with saying that the plaintiff is advised that for a moiety of the judgments, costs and damages so recovered against the estate of his intestate, he is entitled to contribution, inasmuch as the said recoveries were for a joint malversation in office. The proceedings at law verify the allegations in the bill, with the exception that in one of the cases it is alleged that the inspectors refused to deliver the tobacco, because it had been before delivered to an order, which is said, but not proved, to have been forged.

The answer is by the administrator of the deceased inspector, and neither admits nor denies the allegation in the bill, but insists that the recourse ought to be had to the distributees of his intestate, to whom the estate had been delivered. I shall lay no stress on the last allegation in the bill, that the judgments were for a joint-malversation in office, because, I think it gives the correct character to the case before stated by the plaintiff, the failure to deliver the tobacco by the inspectors without assigning any other than the circumstances before stated, as the cause was a refusal to deliver it, which was a joint-malversation in office. That other circumstances may have existed, is possible, but none are alleged or proved. The refusal to deliver the tobacco, under the circumstances alleged, was a joint wrong in the inspectors, and to joint wrong-doers, neither a court of equity nor of law will afford contribution.

The case in 8 T. R. proceeds on this rule. The principle in both courts is that joint wrong-doers shall not be tempted to commit wrong by dividing the responsibility. This principle

applies *a fortiori* to public officers. I admit that courts of equity take a broader jurisdiction. They relieve in all cases in which the parties are in *æquali jure*, but neither court will relieve in a case in which they are in *pari delicto*, which I consider to be the case now before the court. The case in Vesey and Beames was decided upon this distinction. I am, therefore, still of opinion the decree must be affirmed.

The decree of the court of chancery was affirmed.

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### STUART v. LUDDINGTON.

[1 RANDOLPH, 408.]

**ESTOPPEL, ADMISSION BY MISTAKE.**—Where, in a dispute concerning boundaries, one of the parties admits, and yields to the claim of the other through mistake, and without consideration, he will not be estopped from asserting his right, upon discovering the mistake; and generally no concealment, misrepresentation, or negligence, will work an estoppel of one's right, unless it be fraudulent, and another is thereby induced to part with something of value.

**APPEAL** from the court of chancery. The facts were: One Lockhart having patents for two tracts of land, containing respectively four hundred and four hundred and forty-nine acres, sold a part of the four hundred and forty-nine acre tract to one Reider. Previous to this sale, Luddington, the appellee, claiming that Lockhart's two tracts did not join each other, but that there was a strip of forty-five acres of vacant land between them, located the same upon treasury warrants, in 1791. At the time of the sale to Reider, Lockhart had a surveyor to run the lines, when a dispute arose between him (Lockhart) and Luddington as to the boundary, the former claiming that his patent covered the land taken up by Luddington. Luddington stated that if the patent did cover it, he would give up his claim, as he did not wish to go to any further expense. The surveyor gave it as his opinion that the patent did not cover the land claimed by Luddington, whereupon Lockhart yielded the point, and the lines were run, and the deed made to Reider according to this idea. Luddington then went on and perfected his title. Some years afterwards, Lockhart sold the four hundred acre tract to Stuart, the appellant, who, claiming that his deed covered the forty-five acres taken up by Luddington, brought ejectment for the same against one Nicely, who was in possession claiming through sundry mesne conveyances from Luddington, in which action Stuart obtained a verdict

and judgment, and turned Nicely out by a writ of possession. Luddington, who in his conveyance of the land had made himself responsible for the title, filed this bill against Stuart, Nicely and Lockhart's heirs, setting up the facts as to Lockhart's relinquishment of his claim to the land at the time of said survey, and praying that an issue might be directed to ascertain the true boundary of the four hundred acre tract, and that Nicely might be restored to the said land, and quieted in his possession of the same, etc. Stuart in his answer denied the allegations of the bill concerning the said relinquishment, and relied on the judgment in ejectment, as conclusive evidence of his title.

The facts being proved as alleged in the bill, the chancellor decreed in favor of Luddington on the ground of Lockhart's relinquishment of his claim, which induced Luddington to perfect his title and improve the land. He, however, directed an issue to try whether Stuart had notice at or before his purchase of Lockhart's relinquishment, and of the claim of Luddington, or of any one deriving title under him, to the land in controversy. The jury found that Stuart had notice of all these facts, and the chancellor thereupon made a final decree, restoring Nicely to possession, and quieting him therein, and requiring Stuart to account for the rents and profits since the ejectment. From this decree Stuart appealed.

*Wickham*, for the appellant.

*Leigh*, for the appellee.

**GREEN, J.** For the purpose of this cause it must be taken for granted, after the verdict and judgment at law (which are not impeached upon any ground which would justify the interference of a court of equity by awarding a new trial), that the legal title to the land in controversy is in the appellant; and so the case was considered by the chancellor. The only question in the case therefore is, whether the alleged abandonment by Lockhart of his claim to the land as stated in the bill, ought in equity to preclude him or his assignee with notice from asserting the legal title. Luddington, in 1791, upon the mistaken supposition, as it has turned out, that there was a slip of vacant land between two patents held by Lockhart, and which mutually called for the lines of each other as a common boundary, located the land so supposed to be vacant. But before Luddington had taken any other steps toward procuring a grant for the land, Lockhart proceeded to survey one of his patents, with a view to a sale thereof to Reider. Upon that survey,

which Luddington attended, it was found that there was a marked corner and line, corresponding with the calls of the patent, but which did not coincide with the marked corner and lines of the other patent; and it was the land between these lines which Luddington had located as vacant. Lockhart stated that the survey ought to be extended, so as to connect with the other patent, and Luddington stated that he was willing to give up his claim to the land in question, if Lockhart's patent covered it, as he did not wish to go to any further expense about it if it was previously appropriated.

The surveyor gave it as his opinion that the survey ought not to be extended, and Lockhart abandoned all claim to the land in question, and completed his survey according to the marked lines, and sold by that survey to Reider. This transaction had nothing of the character of a contract between Lockhart and Luddington, so as to be a fit case for a decree for a specific execution. There was no consideration passing between the parties. There was no promise to convey, and if there had been such a promise, it would not have been binding, as it would have been made without consideration, and upon an erroneous opinion of Lockhart in relation to his rights. There was no compromise of conflicting claims. Luddington did not even suggest that he was willing to abandon his claim if Lockhart claimed title to the land, but only in the event that Lockhart's patent really covered the land; so that if the surveyor had been of opinion that the survey ought to be extended to the marked line of the other patent, it would still have remained discretionary with Luddington to waive his claim or not, according to his pleasure. Upon the ground of contract, then, the appellee can assert no right to the land in question.

The rights of a party may be bound by, or he may be held responsible for, the consequences of his concealment or misrepresentation, or gross negligence in relation to them, according to the circumstances of the case, in favor of any person, who may be thereby induced to part with his money.

But no concealment or misrepresentation can have that effect, unless it be collusive or fraudulent, or the negligence be so gross as to amount to proof of fraud: *Pasley v. Freeman*, 3 T. R. 51; *Haycroft v. Creasy*, 2 East, 92; *Ibertson v. Rhodes*, 2 Vern. 554; 1 Foub. Eq. 163, note n; *Evans v. Bricknell*, 6 Ves. Jun. 183; *Holmes v. ———*, 12 Id. 279; *Dance v. Spurrier*, 7 Id. 231.

In the case at bar, both parties had precisely the same information as to Lockhart's title. On his part there was no

concealment or misrepresentation. He had no intent to deceive or injure Luddington; he cannot be charged with any fraud. His abandonment of his title, as it is called, probably had no influence upon Luddington's after-proceedings in perfecting his title, for he had previously located the land as vacant, upon his own judgment as to the validity of Lockhart's title, and would probably have proceeded to procure his patent. If Lockhart had never abandoned his title, the case seems to be at most one of mutual error, and in which both parties are innocent; and in such case, the equity being equal, the law should prevail.

There is no charge in the bill that any permanent improvements on the land had been made by Luddington, or those claiming under him, for which compensation could be asked; and, therefore, on that subject no decree can be made.

I think the decree should be reversed and the bill dismissed with costs.

The other judges, except CARELL, J., who was absent, concurred, and the decree was accordingly reversed, and the bill dismissed with costs.

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In *Richmond v. Poe*, 24 Gratt. 149, the authority of this case was recognized on the point that no estoppel should operate against a party ignorant of his rights.

CASES  
IN THE  
CONSTITUTIONAL COURT  
OF  
SOUTH CAROLINA.

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**MIDDLETON v. HEYWARD.**

[2 HOTT & McCORD, 9.]

**USAGE AS TO FREIGHT.**—In an action by a carrier against a consignor, for freight on rice shipped to Charleston, the defendant may give evidence of a custom in the river trade to look to the produce and consignee alone for the freight.

**ACTION** on an account for freight on rice shipped on the plaintiff's vessel, by the defendant, from his plantation to his factors in Charleston. The defendant offered parol evidence of a usage of the river trade for carriers of produce to Charleston to look to the produce and the consignee alone for the freight money. The plaintiff objected to the evidence because the pretended usage was contrary to law, which objection was sustained by the court, and a verdict was found for the plaintiff. The defendant moved for a new trial on the ground that the rejection of this evidence was erroneous.

*Parker*, for the motion.

*Prioleau and Ford*, contra.

By Court, GANTT, J. In this case, the only point for the consideration of the court is, whether the defendant could legally have gone into proof of the custom and usage contended for. By the act of December, 1712, 1 Brevard's Dig., 136 P. L. 99, making the common law of England of force here, exception is made to so much thereof as is "inconsistent with the particular constitutions, customs, and laws of the province." Here is seen a plain recognition of existing customs at that period; and in relation to which the common law is made to give place. The customs alluded to are not specifically defined, and local

usages may be embraced within the generality of the expressions used in the act. The object of the defendant, in this action, was to introduce evidence of a particular custom; and authority is not wanting to show that it is the province of the jury to decide thereon: See *Doctor and Student*, c. 7, 10; 1 *Inst.* 110. How far the defendant might, or might not, have been able to establish by proof such a custom, it is impossible to say, as the evidence was rejected.

Now, although at the first blush the custom alleged may appear unreasonable, and such as ought not to prevail, this is by no means conclusive, that the usage was not a good one in law. In such cases, recourse is had to artificial and legal reason; and thus considered, such usage may be shown to be beneficial to the boat-owners themselves, and dictated by the soundest policy of expediency. It is possible the defendant may find it a difficult undertaking to defeat the claim of the plaintiff, by any proofs which he shall be able to produce in confirmation of the custom relied on; but no judgment can or ought to be formed till the proofs are brought forward. I am not prepared to say that in undertakings of this kind the general law may not become altered by the understanding of the contracting parties, although such understanding places them upon a different footing from that which exists at the common law.

It is competent for a man or a body of men to renounce a common law right, if they think proper; and if, in relation to the river trade, either from views of interest on the part of the boat-owners, or other politic consideration, expediency has pointed out the propriety, and usage has sanctioned it, then it might become the law by which the contract should be expounded; nor can I see how it would in any manner infringe upon the principles of the common law. It cannot be denied, but that by an express agreement the consignor may be absolved from all responsibility; and established usage and custom, bottomed upon expediency and the convenience and interest of the parties, may have the same effect.

I am of opinion that the defendant should have been permitted to have gone into evidence of the custom, that it was the province of the jury to decide thereon; and that a new trial should be granted.

COLCOCK, and NOTT, JJ., concurred.

JOHNSON, J. I take it to be a settled rule of the common law (in the absence of any express contract), that a carrier, shipper

or owner has a lien on the goods, or an action against the consignor for freight, distinctly recognized and acted upon, not only in this state, but in almost every other commercial country so much so, that it would be idle to attempt, at this day, to adduce authorities to support it. But it is alleged that the particular custom, set up in this case, and offered to be proved, forms an exception to this general rule, and that the proof ought to have been suffered to go to the jury. But the proof offered in what shape you will, and give it the greatest possible extent you please, and it will amount to no more than this, that it is the usage in Charleston for the factor to pay the freight of produce consigned to him. This usage either is or is not consistent with the common law rule. If the former, it does not abrogate the common law, and may exist with it, and only proves that the shipper, owner or carrier has by this custom a remedy against the factor for freight, which was not given to him by the common law, and the evidence was therefore inadmissible; if the latter, then I say that it is inadmissible, because our books of authority teem with cases in which the ship-owner or carrier has recovered, against the consignor, the freight of his produce. I venture to assert that upon examination of the proceedings of the several courts in this state, hundreds of cases will be found in which plaintiffs have recovered on this cause of action, and under the same circumstances.

One, the title of which has escaped my recollection, was tried by myself at Camden, about a year since, and not a word had before been heard of this custom. But it is further said, that this was a question for the jury, and therefore the evidence ought to have gone to them. I admit that the existence or non-existence of a particular custom is a question exclusively for the consideration of a jury, but its legality is a question of law which belongs to the court to decide. It belongs to the court to decide, because the court alone are presumed to know the law, and when the question is once determined, that the custom set up is either consistent with, or contrary to the known and established rules of law; to suffer such evidence to go to the jury, would be at once to break down all distinction between the powers of the court and jury, and produce consequences, the tendency of which are not easily foreseen. I regret that time has not permitted me to enter into this case so fully as I wished and intended. It appears to me, however, to depend upon principles that cannot be misunderstood, and which, from the best consideration I have been able to give



them, lead me to the conclusion that the opinion, which I entertained on the trial, in the court below, was correct, and that the evidence was properly rejected.

BAY, J., concurred with JOHNSON, J.

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### STATE v. EDWARDS.

[2 NOTT & McCORD, 12.]

**QUESTION TENDING TO CRIMINATE.**—It is for the witness and not the court to judge whether his answer to a question will tend to criminate him; if it will form one link in the chain of testimony against him, he is not bound to answer; and the court should so instruct him as to enable him to decide understandingly.

**INDISCRETION** for sending a challenge, accepting a challenge and fighting a duel. At the trial, the following question was put to certain witnesses, by the prosecution: "Have you at any time heard the defendant acknowledge or admit, that he had sent a challenge to the late Mr. Dennis O'Driscoll, or accepted one from him, or fought a duel with him?" The witnesses refused to answer the question on the ground that the answer would tend to criminate them. The prosecution insisted that it was for the court and not for the witnesses to decide whether their answer would have a criminating tendency, and claimed that no answer which could possibly be given to this question, would have that tendency; but the court sustained the refusal of the witnesses to answer, holding that it was their province to decide the matter. For this ruling, after a verdict of acquittal, the state moved for a new trial, on the ground: 1. That the presiding judge mistook the law in not compelling the witnesses to answer; 2. That the answer to the question could not criminate the witnesses, and of this the court should judge; and, 3. That this decision would destroy the dueling law and protect reluctant witnesses in every criminal case.

*Hayne, attorney-general, for the motion.*

*Drayton, contra.*

By Court, COLCOCK, J. I presume no rule on the subject of evidence is better established than that a witness shall not be bound to criminate himself. The only difficulty arises in the application of the rule. It must be admitted that if the question has a tendency to criminate the witness, according to the

rule he is not bound to answer. But it is said the court should decide this point, as to some questions. It is utterly impossible that the court can decide without possessing a full and complete knowledge of all the facts which it may be important for the witness to conceal. Therefore, something must necessarily be left to the witness; and we have the same security for a knowledge of the fact, that he may be implicated by the answer, that we have for the knowledge of any other fact.

It was urged that an ignorant man might not be able to decide. The court will always so instruct a witness as to enable him, if he possesses any understanding, to determine whether he may be jeopardized by the answer; and if the answer may form one link in a chain of testimony against him, he is not bound to answer: *Phillip's on Evid.*, Dunlap's ed. 206; *King v. Gordon*, 2 Doug. 593; *Honeywood v. Selwin*, 3 Atk. 276; *Gates v. Hardacre*, 3 Taun. 424. Under the act against dueling, all who counsel one to fight, as well as the seconds who are engaged, are made liable to the penalties. If the witness stood in either of these relations, he might be implicated by answering the question. It is not necessary that the privacy of the witness should at once appear by the answer; nor will it be contended that that would have been the case here, but it may have formed a link in a chain of testimony extracted from him, or obtained from other sources, which may have tended to criminate him. It was contended that on a cross-examination the witness may have refused to answer any question which had a tendency to criminate him; but that this question did not tend to criminate him. This appeared to admit the whole argument of the counsel for defendant; for both the court and the witness thought it might, when connected with other matters, produce the consequence.

But supposing the answer had not such tendency, and that the state had closed there, the defendant, upon his cross-examination, would naturally have asked at what time and place, and under what circumstances, was the confession made. I presume it will be admitted that answer to this might have implicated the witness; then he was permitted to refuse to answer; what would be the result? Could it be expected that the defendant would be convicted on the garbled testimony of a witness, and that, too, of so high a misdemeanor? I presume not. If, then, there be any doubt as to the tendency of the question, I think it is obvious another would have removed the doubt, and therefore that the presiding judge decided correctly that the witness should not be compelled to answer the ques-

tion. Although we may regret that the act is defective, yet we have no power to legislate on the subject. It must be referred to the proper tribunal. I do not conceive that the doctrine is calculated, as was contended, to protect reluctant witnesses generally; for it is clear that if a witness swear he may be implicated in the guilt of the accused if he answer, and this afterward appear to be false, he would be liable to an indictment for perjury. It is admitted that it might be difficult of proof; but if that were to be an objection, much testimony which is daily received might be excluded. Suppose a witness called to prove the acknowledgments of a defendant, which was to operate against him, should swear that it was made to him when alone, or to him in the presence of a person at that time dead, and this should be false; how, I ask, could he be convicted of perjury? It was necessary that an opinion should be expressed on this point, as it may render some alteration in the act necessary.

But on the question whether such an appeal can be sustained I entertain no doubt. I think I may venture to say that no case can be found where a new trial has been granted after acquittal, unless where it has been effected by the fraud or artifice of the accused. In the case of *King v. Mawley*, and three others, from 6 T. R. p. 620 to 640, two were convicted and two acquitted. The court were clearly of opinion, and so ordered, that a new trial should be granted as to those who had been found guilty. The difficulty was, how they should be separated on the second trial. Two modes were suggested; one was to alter the venue; the other to make an entry on the record that two had been improperly convicted, and then to award a new trial as to them.

Lord Kenyon says, Id. 640: "I do not know that the first mode is objectionable. The second mode suggested has already been adopted; it was so in *Rex v. Robbins*," and of course I conclude it was adopted by them. I confess that at first it did strike me that perhaps a distinction might be made when the testimony relied on by the state had been unexpectedly excluded. But I am satisfied that all cases, however determined, must stand on the same footing in this respect.

When a criminal case is put to a jury, it cannot be withdrawn, except by the consent of the accused, or by some unavoidable accident to one of the jury or the court. The state, therefore, is bound to be ready when the case is put to the jury.

I am against the motion on all the grounds.

GANTT, and JOHNSON, JJ., concurred.

## GIBBS v. CHISOLM.

[2 NOTT &amp; MCCORD, 22.]

**INTEREST UPON UNPAID INTEREST.**—Where one gives a bond for the payment of a certain sum, conditioned to pay the interest, together with one third of the principal, annually, until the whole was paid, it was held that interest was collectible on unpaid installments of interest after they became due.

**RULE** upon a sheriff to show cause for not collecting and paying over money according to the exigency of a writ of execution. The facts were: The defendant, Chisolm, gave his bond conditioned for the payment to the plaintiff, Gibbs, a master in equity, of the sum of twenty-four thousand seven hundred and fifty dollars, for a certain estate purchased by the former from the latter, payment to be made "in three equal annual installments, viz., one third of the principal on or before first of November, 1812; another third on or before first of November, 1813; and the remaining third part on or before first of November, 1814; with interest on the whole principal sum, to be paid annually at the end of each year." Payment not having been made according to the condition, the bond was put in suit, and judgment recovered thereon February 12, 1816. Execution was issued on this judgment to the sheriff of Charleston district, who collected the principal sum with simple interest thereon, omitting interest on the several unpaid annual installments of interest after they became due, which the plaintiff claimed that he was entitled to receive. At the instance of the plaintiff, a rule upon the sheriff was granted, requiring him to show cause why he had not levied the interest on the said unpaid installments of interest; but at the hearing, the presiding judge, Johnson, J., decided against the plaintiff's claim, and discharged the rule, from which the plaintiff appealed.

*H. A. Desaussure*, for the plaintiff.

*Prioleau*, for the defendant.

**BAY, J.** I have endeavored to give the authorities and grounds in this case the best consideration my time would allow me, on the present occasion; and from the best view I have been able to take of the case, I am clearly of opinion that there was nothing illegal in this contract, originally, and if not illegal in its origin, then I think it is binding on the parties.

Every man is free to contract or let it alone; but if he thinks proper to enter into one, then the terms and conditions of it,

unless immoral or illegal, becomes a law to them, and forms what civilians call the law of the contract. On the present occasion, Mr. Chisolm had an undoubted right to enter into any contract he thought proper, with the master in equity, for the purchase of the estate in question; and, on the other hand, the master in equity, had an equal right to prescribe such terms and conditions as he thought proper, for the payment of the consideration-money; therefore, the parties stood in the most perfect reciprocity towards each other.

The next inquiry then, is, whether there is anything illegal or immoral in the terms agreed upon by the parties. The latter is not even insinuated, and as to the former, there was certainly no existing law against it. The law, to be sure, says, that if more than seven per cent. interest is reserved, for the use of money, it is usurious, and every such contract shall be void. But the law nowhere says, that a man may not make the legal interest payable in such a manner and at such time as he may think fit and reasonable. This may be often necessary and proper for the support of families, and the convenience of women and children, when the principal sum is not immediately wanted. And is it for this court to set bounds and limits, or to fix other terms and conditions to contracts, than those agreed upon by the parties themselves? It would be a most dangerous assumption of power, if they did, utterly unknown to the laws of the country.

Let us examine a little further, and see what the nature of the contract under consideration was. It was to pay the principal sum, mentioned in the condition of this bond, in three years, by three equal, annual installments. There was surely nothing illegal in that part of the agreement. Next, an agreement to pay the whole of the interest, due on the principal sum, at the end of each year, as the installments came around, and became payable. What interest? Not usurious interest, but the legal interest of the country. Can any man pretend to say that it was usurious to receive the legal interest at the rate of seven per cent. on the whole of the principal sum at the end of the year, when the first installment became due? No one will be hardy enough to assert that it was, even if the contract had been silent on the subject. But there was an express agreement that the interest should be paid at the end of every year. It is evident, then, that the whole of the interest became due, at the end of each year, and raised, in law, an undertaking to pay the amount as substantially, as if he had given a note or a bond, for a

specific sum equal to the interest. And I think I am fully confirmed and warranted in this opinion, by the case from 2 Mass. 568, quoted by plaintiff's counsel in the argument, where a note was given, payable in eight years, with interest annually; in which it was held, that an action lay for the interest before the principal became due, at the expiration of each year. Now, I confess, I cannot see the difference between the Massachusetts case and the one under consideration, unless it be, that the one was upon a simple note of hand, and required an action to recover the interest, whereas, in this case, the whole was covered by the penalty of the bond, and the execution warranted the levy of the interest by the sheriff, without further suit.

The case quoted from Judge Taylor's Reports, 231, *Kennon v. Dickens*, is equally as strong as the Massachusetts case. That, like the present, was a contract for the purchase of land, at and for the price of one thousand pounds Virginia currency, on a credit of fifteen years, for the principal sum; but the interest was to be paid annually, at the rate of six per cent. per annum, for which the defendant gave his bond, with security, in two thousand pounds. In that case it was decided by the court that there could be no doubt, but that the installments bore interest from the times they respectively became due; for being principal debts, and secured by specialty, such consequence follows, of course, upon the failure of the payment of interest according to the agreement of the parties. The court then goes on and says that, as a general rule, interest upon interest is not allowable. But when the sum is ascertained, and the annual interest on it forms a part of the contract, and when it is so specific that an action of debt may be maintained upon it, then it ought in justice to be allowed to supply the place of prompt payment, and indemnity to the creditor for his forbearance.

It would seem that the foregoing authorities, and the reason and justice of the thing itself, would not require any further illustration for the principle contended for by the plaintiff. But as there is some diversity of opinion on the subject entertained by the bench, I have to observe that, in my opinion, the English authorities confirm the above legal principles of our sister states as well as the decisions in our own state.

In the case quoted from Ord on Usury, 86, it is laid down as decided law that where a judgment is obtained on a debt due by record, interest is allowable on the original debt, interest and costs. In this case it is evident interest is allowable on in-

terest, where such interest has become due, and has been fixed and ascertained. To which I add that in Black. 267, it is also laid down as a rule that judgments at law bear interest on the accumulated sum of debt, interest, and costs. So in *Brown v. Barkham*, 1 P. Wms. 653, Lord Parker says, a master's report, computing interest, makes that interest principal to carry interest; for a report is as a judgment of the court, and the party's disobedience, in not complying with the time of payment, ought to subject him to payment of interest. So that both the courts of law and equity concur upon the point of interest carrying interest in all cases where judgments are entered up, or where a sum is reported due by a master in chancery.

In the case of *Gladman v. Henchman*, 2 Vern. 135, a mortgage was made for four hundred and fifty pounds principal, payable at the end of five years, and in the mean time interest to be paid half yearly. No interest being paid, about two months before the five years expired, the mortgagee assigned to defendant, in consideration of five hundred and sixty pounds, being then so much due for principal and interest. The question then before the court was, whether the interest then due should carry interest. It was objected that "the mortgagee ought not to have assigned until the five years had quite expired; *sed non allocatur*, for the mortgage was forfeited long before, by non-payment of interest. And the court decreed the five hundred and sixty pounds to be paid, with interest from the time of the assignment." This was only carrying into effect the original agreement of the parties, and as the interest had not been paid up half-yearly as stipulated, the court allowed interest upon the interest, which should have been paid as an indemnification for the delay; and this is, in my opinion, exactly such cases as the one now under consideration.

In *Chesterfield v. Cromwell*, 1 Eq. Ca., Ab. 287, Lord Chancellor Wright lays it down as a rule, that though regularly interest shall not carry interest, yet in some cases it would be singularly unjust, not to allow it; particularly when made for the benefit of infants, who, without this agreement, might be destitute of subsistence. In this latter case, the party was held to his agreement to pay interest as stipulated; and in default was compelled to pay interest upon the interest as it became due.

The cases in our own courts, where interest has been allowed upon interest on judgments, as in the case of *Lamkins v. Nancee*. determined in Columbia in April, 1806, and that of

the assignees of Miller, a bankrupt, against the executors of John Fabre, determined at Charleston, in 1807. These were both actions on judgments, and the court held, in both cases, that the plaintiffs were entitled to interest on the accumulated sum of the original debt, interest, and costs; and, I may add, that a great variety of other cases have been determined upon similar principles since.

As to the cases quoted for defendant, by his counsel, Mr. Prioleau, from Salk. 449, where it is said, "that a proviso in a mortgage, to make interest principal, if it was behind and unpaid for six months, was vain and of no use; and that to make such an agreement valid, it is necessary that the interest should grow due for it; and then an agreement concerning it may make it principal." With great respect to the memory of the learned sergeant, who reports that case, I cannot bring myself to assent to the reason and the conclusion he draws from it, especially after the numerous and pointed authorities I have already quoted in support of the present motion, most of which are later authorities than the one reported by Sergeant Salkeld, and consequently go to overrule the decisions made in the above case. But the principal objection I have to it is, that it goes to abridge and destroy one of the original rights of mankind, in the formation of contracts, and that free agency to which every man has a natural right, in making his own agreements. In all those cases where the policy of the law forbids certain contracts, I admit that every man is circumscribed; but in all other cases he is unrestrained. It is not alleged in the case in Salkeld, that there was anything illegal in it, or that it was prohibited by law; only that it was vain and of no use, because the interest had not become due; or, in other words, that a man had not a right to contract or stipulate upon a contingency which was to happen after the contract was made, and which was to spring out of the contract itself, as one of its certain and eventual consequences. I confess I cannot see the force of this kind of reasoning upon such a subject, and therefore cannot yield my assent to it; I am constrained to give the same answer to the cases quoted by the defendant's counsel from 1 Binn. 175; and Johns. Ch. 14 [*Connecticut v. Jackson*, 7 Am. Dec. 471]. But even to give all those cases their utmost latitude, as contended for, they are not analogous to the cases under consideration; for they were all cases to convert interest into principal as it became due; whereas, in this case, it is on agreement to pay the legal interest to the plaintiff, on the principal sum,



at the end of every year, for his convenience, or subsistence, as he thought proper to appropriate it. There is, therefore, nothing illegal or unjust in the whole transaction on the part of the plaintiff, and as he appears to me to be as justly entitled to interest on the sum which should have been paid him at the end of every year, for interest, as he was to any part of the principal sum mentioned in the condition of the bond, agreeably to the original interest and design of the parties when the contract was made and entered into.

I am therefore of opinion that the rule should be made absolute against the sheriff, unless he will go on and levy the interest on the different payments which were to have been made for interest-money at the end of each year, agreeably to the condition of the bond. But if he will raise and collect the same, and pay the amount over to the plaintiff or his attorney, that then, and in that case, the rule to be forthwith discharged.

NORR, J. I concur in the opinion which has been delivered by my brother Bay in this case, but as it appears susceptible of so many different views, I beg leave to express my own opinion in my own way.

If there be nothing unlawful in such a contract, the court must enforce it, and it is not unlawful unless it be usurious. If it be usurious, the whole bond is void, and the plaintiff can recover nothing. In England, with all the strictness which has prevailed in their courts on the subject, such a bond has been held not to come within the statutes against usury: 4 T. R. 613; 2 H. Blackstone, 144. In Massachusetts and North Carolina it has been decided that such a contract is lawful, and that the payee is entitled to interest on the interest, so agreed to be paid: 2 Mass. 568; Taylor's, 231. To constitute usury, more than seven per cent. must be reserved for the annual use of money. In this case nothing is required except simple interest on the money due from the time it was to have been paid. A part of the money so due, to be sure, was interest, which became converted into principal, but there is nothing unlawful in that.

Let us only state the case in another form and the whole mystery will disappear. Suppose a person were to sell an estate worth ten thousand dollars on a credit of ten years, and instead of reserving interest to be paid annually on the face of the bond given for the purchase-money, he shall have it secured by ten several notes, payable, one, two and three years, and so on, up to ten years, after date. Would not each note carry interest

from the time it became due, and would it not be the same thing if it were expressly stipulated in the conditions of the bond? The annual interest of ten thousand dollars is seven hundred dollars, and whether a person promises to pay seven hundred dollars, or the annual interest of ten thousand dollars, is only using different words to express the same idea, for that is certain which can be rendered certain.

It is said there is no express promise in this case that the interest shall be converted into principal, and that interest shall be paid upon it. But when a person promises to pay a specific sum on a given day the law implies a promise to pay interest from that day if the principal is not paid. And he adds nothing by an express promise to an obligation which the law requires him to perform. There is nothing oppressive or unjust in such a contract.

Suppose a person, for the purpose of making convenient provision for a family, should sell all his estate on a long credit, with interest payable annually for their support. Would they not be entitled, even in equity, to interest on each installment if the payment should be withheld?

The case from 1 Johnson's Ch. 14 is a case of compound interest. Not so here. All that the party demands is simple interest on the amount stipulated to be paid. The cases read from the equity books are either cases of compound interest or of peculiar hardship, in which that court felt authorized to grant relief; but this court must proceed according to settled and uniform rules of law, and cannot accommodate their decisions to the circumstances of every particular case. If there be anything in the case which will authorize the interposition of a court of equity, to that court let the party apply.

COLCOCK, J., concurred.

JOHNSON, J. Distrustful as I am of my own judgment, when it leads me to differ from the opinion of the majority of my brethren: and willing, as I always am, to yield to that high authority on doubtful questions, I cannot persuade myself to give even a reluctant assent to the doctrine established in this case. I think it subversive of the morals and the interests of the community, and calculated to open a high road to the most abominable usury, and to break down the guards which the law has placed over the hard-hearted usurer.

The policy and propriety of regulating interest on money by law have been called in question, I am aware; but I am inclined to think it may be vindicated. It is not, however, my intention,

nor is it necessary, to discuss that question. It belongs to another department of the government, and it is sufficient for my purpose that I find in our statute book a law forbidding the reservation of more than seven per cent. per annum, and in that proportion for a greater or less period, for the loan of money, etc.

In considering this question, I shall, in the first instance, lay aside the consideration, that in this case there is no express stipulation that the annual interest should become principal and carry interest, and consider it on the broad ground, that in whatever shape it may be put, it is subversive of the laws against usury.

Upon a rough calculation which I have made, a sum put to interest on the principle that the annual interest shall carry interest, will, in the short period of twenty years, produce an average amount of annual interest of about twenty-six per cent. But if the contract should provide for the quarterly or monthly payments of the interest, an inconsiderable sum would, in a short time, beggar arithmetical calculation. It were better to repeal the laws against usury, and to suffer the unfortunate borrower to rush into ruin at once, than to steal upon him by those almost imperceptible means; for although it may be said that he enters into it with his eyes open, yet we know that those who are pinioned by the hard hand of necessity seldom make the necessary calculations as to consequences. It has been said that our statute provides for the annual interest only, and that any contract making the accruing interest payable at shorter periods would have the effect of giving a greater annual interest and therefore be void. But from the best consideration I am able to give it, I am at a loss to see the distinction. It is true, that a year is given to fix the rate and proportion of interest; but it is equally true, that the statute itself fixes that rate as the standard by which it is to be calculated for a shorter or longer period, and if the doctrine contended for on the part of the motion be established, I see no reason why the lender may not, by his contract, make the interest payable, and become principal *de die in diem*; and where this would end, I leave those whose interest may require it to make the calculation. With regard to the particular case under consideration, I can see no difference between this contract and every other out of which interest would arise, except that it gave the plaintiff a right to sue, on the non-payment of the interest.

In all cases where interest is reserved, and the payment of the principal and interest is postponed until a given day, the

interest as well as the principal will then carry interest; so, that, although the sum borrowed carry only legal interest up to the time to which the payment is postponed, yet after that period a greater interest is allowed. It is said, however, that where the contract is to pay the interest at stated periods, it is the right of the lender to demand it, and the duty of the borrower to pay it; and having it in his possession he may again put it to interest. This is true, but I think the statute gives the answer to this argument. The lender is not permitted to demand more than seven per cent. per annum, and at that rate for the principal sum borrowed. In questions of construction some indulgence is due to the habits of the world and to the indolence of mankind, for they are so deeply rooted that we had as well attempt to reverse the laws of nature as to alter them.

It has been further insisted that the question is resolved into the inquiry, whether the contract is, or is not, void, as being usurious? That, if it is not we are bound to carry it into effect. That question might arise where the contract provides that the interest shall carry interest, I am not prepared to say that the whole contract is void. On the contrary, I am inclined to think it is good as to the principal sum and the legal interest, but void as to the provision, on account of its tendency to usury and on account of its being predicated on a consideration which had no existence at the time, and which, I think I have shown, never could have had an existence. To which I will only add that if it had for its basis a view to an increased rate of interest it is usury, and if it had not there was no consideration.

On the ground of authority I might, I think, content myself with the able and masterly review which Chancellor Kent has taken of them, in the case of the *State of Connecticut v. Jackson*, 1 Johnson's Ch. 13 [7 Am. Dec. 471], in which he comes to the conclusion that interest upon interest ought not to be allowed except in a few cases which furnish exceptions to the general rule, within which it is not pretended that this case falls. His reasoning as well as his conclusion is so satisfactory, to my mind, that I cannot do better than to adopt them as my own. I cannot, however, forbear to add the authority of Lord Chancellor Cowper, in the case of *Lord Ossulston v. Lord Yarmouth*, 1 Salk. 449. He says an agreement at the time of the mortgage will not be sufficient to make future interest principal; but, to make interest principal, it must first become due, and then an agreement concurring it, may make it principal. *Vide also Lewis v. Bacon*, 3 Henning & Munf. 89, 116; *Sparks v. Garrigue*, 1 Binney, 165. It is said, however high this authority may be,

it is the decision of a court of chancery, in which the rule may be different from that which governs a court of law. It is true that in the case referred to Chancellor Kent has left that question unsettled, and he says that perhaps a court of law would not carry such a contract into effect. But on this subject my mind is equally satisfied.

The jurisdiction of a court of chancery differs little from that of the court of law, except in the mode of obtaining of evidence and administering relief. It is equally bound by the rules of law in the construction of contracts, and has no more power to carry into effect a contract, illegal in itself and void of consideration, than this court. The case of *Le Grange v. Hamilton*, 4 T. B. 613, cited on the part of the motion, establishes a position that has not been denied. It is, that where payments have been made on a contract carrying interest, the interest shall be first deducted out of the payment, and the balance passed to the payment of the principal sum; and that a contract providing for it is not usurious. It is not usurious because it is the legal consequence of a contract to pay interest on money; but I would say, that it was an useless and unmeaning surplusage.

All the direct authorities which have been adduced on the part of the motion are *Greenleaf v. Kellogg*, 2 Mass. 568; Taylor, N. C. 231. To these are opposed the cases above cited, and the current of English decisions. Perhaps, too, these may have arisen out of the peculiar wording of their statutes against usury; or, perhaps, they may be found in the rage which has run the rounds of the United States, within the last few years, to loose entirely the shackles which the laws against usury impose. As highly, therefore, as I respect these authorities, when thus supported, I cannot surrender my own opinion. This opinion has grown up with me from my infancy, and is taught as a lesson in schools; and I venture to say, that there is not a school-boy or a counting-house clerk who has learned to calculate interest, that will not tell you that compound interest is not lawful; and this is surely one species at least of compound interest. Upon inquiry, also, among merchants and money-brokers, it will be found, that such a principle of calculating interest has never been recognised as lawful.

GANTT, J. concurred with JOHNSON, J.

Rule made absolute.

## BURDEN v. McELHENNY.

[2 NOTT &amp; MCCORD, 60.]

ACKNOWLEDGING DEBT BARRED BY STATUTE.—The slightest acknowledgment of a debt is sufficient to take it out of the statute of limitations. Accordingly, where a debtor referred an account to an agent for examination, it was held that this was sufficient evidence to go to the jury, as showing a promise to pay whatever should be found due, so as to remove the bar of the statute.

ACTION to recover the balance of an account due in 1800, from Mrs. Wilkinson, now Mrs. McElhenny. An action was commenced in 1809, which abated by the death of the defendant's husband, whereupon this action was brought. Pleas, *non-assumpsit* and *non-assumpsit infra quatuor annos*. After the commencement of the action the defendant, in conversation with Mr. Deliesseline, requested him to examine the accounts observing, that it remained so long that she thought it had been settled; and she expressed a wish that he should have reference to certain papers. Mr. D. testified that he did not examine the account, because he had already done so in the life-time of defendant's husband. Verdict for the plaintiff. The defendant moved for a new trial, on the ground that there was not sufficient evidence to take the case out of the statute of limitations.

*Grimke*, for the motion.

*Hunt and Parker*, *contra*.

By Court, COLLOCK, J. I think it is high time this question was at rest. I lay it down that a bare acknowledgment of a subsisting debt is sufficient to take the case out of the statute of limitations. The act was intended as a shield to protect from the payment of debts which had been already discharged. Amidst the casualties of life, receipts or other evidences of payment are frequently lost; and it was found that the estate of deceased persons would be particularly liable to injury without the aid of this act. Wherever a moral obligation exists, there the law raises an assumption. Where a debt is due, there is a moral obligation to pay; and would it not be absurd and contradictory so to construe the act as to oppose this long-established, wise and just principle of law? I am aware that there are contradictory opinions and decisions on this subject. The weight of authority, however, will be found to be decidedly in favor of the rule which I have laid down: 1 Selwyn, 150.

The slightest acknowledgment has been holden sufficient; as

saying "prove your debt and I will pay it;" "I am ready to account, but nothing is due:" *Trueman v. Fenton*, Cowper, 548. The defendant, meeting the plaintiff, said to him, "What an extravagant bill you have delivered me." Lord Kenyon held this a sufficient acknowledgment that something was due: *Lawrance v. Worrall*, Peake N. P. C. 93; S. C., 6 Esp. N. P. C. 92. So in *Clarke v. Bradshaw*, 3 Esp. N. P. C. 155-7, Bradshaw saying, "plaintiff had paid money for him, twelve or thirteen years ago, but that he had since become a bankrupt, by which he was discharged, as well as by law, from the length of time." Lord Kenyon held it to be sufficient to take it out of the statute. The defendant had applied to the court in an affidavit for leave to plead the statute of limitations, that since the bill of exchange, on which the action was brought, became due, which was more than six years before, no demand of payment had been made of him. This was deemed sufficient to be left to the jury as an acknowledgment. And the jury having found a verdict for the plaintiff, the court refused to grant a new trial: *Bryan v. Horseman*, 4 East, 599, and note *a* to page 604. So where a letter was written to the plaintiff's attorney on being served with the writ, concluding in ambiguous terms, neither expressly denying or admitting the debt, it was held that such letter ought to have been left to the jury to consider whether it amounted to an acknowledgment of the debt, so as to take it out of the statute: *Lloyd v. Maund*, 2 T. R. 760; *Bicknell v. Keppel*, 1 New Rep. 20.

In the case before us, the facts were submitted to the jury, with a direction from the judge that the rule now laid down should govern, and I think the determination a correct one. The defendant referred the examination of her accounts to her agent, or to one acting as a mutual agent, by which she is to be understood as saying, I know that there was a debt, though I thought it paid; whatever shall be found due I will pay.

The motion is dismissed.

BAY, NOTT, and JOHNSON, JJ., concurred.

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The decisions on this subject vary greatly. Some hold, as this case, that any acknowledgment, however slight, will remove the bar of the statute: *Lord v. Shaler*, 8 Am. Dec. 160. Other cases go further, and require a promise: *Danforth v. Culver*, 6 Am. Dec. 361; *Bell v. Rowland*, 3 Id. 729.

The courts of South Carolina, like those of some of the other states, have not been entirely uniform in their decisions as to what acknowledgment or promise is sufficient to take a case out of the statute of limitations. Prior to the case of *Young v. Monpoey*, 2 Bail. 278, they were disposed to hold

very slight evidence of a new promise or acknowledgment to be sufficient for this purpose, apparently proceeding upon the assumption that the policy of the statute was founded upon the presumption that a debt, not sued for within the prescribed time, had been paid. Hence, they were inclined to seize upon any declaration or expression of the debtor which seemed to rebut this presumption, in order to avoid the statute bar. In accordance with this view, it was held in *Lee v. Perry*, 3 McCord, 552, on the authority of the principal case, that a mere acknowledgment of the debt as unpaid, although coupled with an avowed purpose to resist payment, would revive the debt, and that therefore where the debtor said "that the note had not been paid, and that he would not pay it, unless compelled by law, as it was out of date, and he had received no consideration for it," the bar of the statute was removed. And again, in *Lindsay v. Jamison*, 4 McCord, 93, the principal case was followed, and it was decided that an acknowledgment in the following form took the case out of the statute: "I have paid the money; but if I cannot show that I have paid it, I will not plead the statute." However, in *Lee v. Polk*, 4 McCord, 216, the court indicated a disposition to take more conservative ground on this question. It was there held that an admission of an account, coupled with the statement that the debtor had a discount against it to a greater amount, would not take the case out of the statute, and *Lee v. Perry* was commented on as the strongest case opposed to this view of the law. Finally, in *Young v. Monpoey*, 2 Bail. 278, the great case of *Bell v. Morrison*, 1 Pet. 351, having been in the meantime decided by the supreme court of the United States, the principles there announced by Judge Story were adopted as the guide of the South Carolina courts on this interesting question; and after a very thorough review of the previous cases, including *Burden v. McElheny*, in which it was shown that the decisions had gone too far in opposition to the policy of the statute, the rule was laid down that a distinction should be made between cases where, at the time of the alleged acknowledgment, the debt was already barred and those where it was not; that in cases of the latter class, a very slight admission of the debt would prevent the running of the statute; but that in cases of the other class, in order to remove the bar of the statute, there must either be an express promise to pay, or an unequivocal admission, unaccompanied by any expression indicating an intention not to pay. Hence, it was held that where, after the statute had run, the debtor who was an indorser of the note sued, said that "he had not been served with notice of protest, and therefore had nothing to do with it, but if he had been legally notified he would have paid it long ago," this was not sufficient to revive the debt, although it should be proved that there had been regular demand and notice. This has been ever since regarded as the leading case in South Carolina on this question, and the principles there announced have been repeatedly affirmed: *Alcock v. Ewen*, 2 Hill, 326; *Silman v. Silman*, Id. 416; *Johnson v. Bounetheau*, 3 Id. 16; *Winyaw Indigo Soc. v. Kidd*, Dudley, 116; *Reigne v. Desportes*, Id. 118; *Lomax v. Robertson*, Id. 367; *Hortbeck v. Hunt*, 1 McM. 197; *Williamson v. King*, 2 Id. 505; *Deloach v. Turner*, 6 Rich. 117; *Brown v. Joyner*, 1 Id. 211.

**NEW PROMISE, CAUSE OF ACTION.**—In *Winyaw Indigo Soc. v. Kidd*, Dudley, 116, it was held that as the new promise was the cause of action, a promise made after the action was commenced could not be given in evidence. A number of cases have variously applied the doctrine that under the intent of the statute the new promise is to be regarded as the cause of action, and the old debt merely as the consideration of such promise: *Reigne v. Desportes*,



Dudley, 118; *Lomax v. Robertson*, Id. 366; *Sims v. Radcliffe*, 3 Rich. 287; *Goady v. Gillam*, 6 Id. 28.

**CONDITIONAL PROMISE.**—It was held in *Grist v. Newman*, 2 Bail. 92, that a promise to pay when the debtor collected the money, was conditional, but as the condition was not repugnant to the original debt, it was sufficient. But in *Allcock v. Ewen*, 2 Hill, 326, it was said that *Grist v. Newman*, did not lay the rule down accurately, in not holding that where the promise is conditional, it is not binding, unless the condition is performed. Other cases holding that where a conditional promise is relied, performance of the condition must be averred and proved, are *Brown v. Jayner*, 1 Rich. 211; *Reigne v. Desportes*, Dudley, 118. See, to the same effect, *Wilcox v. Williams*, 5 Nev. 206; *Bidwell v. Rogers*, 10 Allen, 438; *Bell v. Morrison*, 1 Pet. 351.

**SUFFICIENCY OF PROMISE QUESTION OF LAW.**—The question whether a particular promise or acknowledgment is sufficient to take the case out of the statute is one of law for the court: *Horlbeck v. Hunt*, 1 McM. 197; *Deloach v. Turner*, 6 Rich. 117.

**ACKNOWLEDGMENT TO STRANGER.**—It seems that an acknowledgment or promise to take the case out of the statute should be made to the creditor, or to some one on his behalf, and that if made to a stranger it is not sufficient: *Sibert v. Wilder*, 16 Kan. 176; S. C., 22 Am. Rep. 280; *Robbins v. Farley*, 2 Stroch. 348; *Trummet v. Salmon*, 2 Bail. 308.

## GORDON v. GOODWIN.

[2 Nott & McComb, 70.]

**NON-JOINDER OF EXECUTORS.**—Where one sues as executor, the non-joinder of his co-executors as plaintiffs is not a ground of nonsuit, but the objection must be taken by plea in abatement.

**SECRET SETTLEMENT, WHEN FRAUDULENT.**—Where a father purchased property with his own funds, but took a bill of sale to himself as agent of certain trustees for his wife and children, and kept the same secret, using the property, it was held, on a subsequent sale by him to a *bona fide* purchaser for value, without notice, that the bill of sale was fraudulent as to such purchaser.

**ACTION** by the plaintiff, as executrix of Ambrose Gordon, to recover the possession of certain negroes from the defendants, Charles Goodwin and A. Beggs. Pleas, the general issue, and the statute of limitations. At the trial the defendant Beggs, who alone defended the action, moved for a nonsuit, on the ground that two other executors of the will of Ambrose Gordon were not joined as plaintiffs; but the motion was overruled. The plaintiff claimed the negroes under a bill of sale to her testator from Charles Goodwin, made January 6, 1802. The defendant Beggs claimed as the husband of one of the daughters of the wife of the said Charles Goodwin, under certain bills of sale conveying the said negroes to Goodwin as an agent for cer-

tain trustees for the wife of the said Goodwin and for her children. The facts concerning these bills of sale are stated in the opinion. It appeared from the testimony of one Benjamin Sims, that shortly after the sale by Goodwin to Gordon, he (Sims), as agent for Gordon, demanded and received possession of the negroes, but suffered them to remain with Goodwin until the further orders of Gordon, who died soon afterwards.

The jury having returned a verdict for the plaintiff for the possession of the negroes and one thousand two hundred and fifty dollars damages, the defendant renewed his motion for a nonsuit, and moved for a new trial, on grounds which sufficiently appear from the opinion.

*Grimke*, for the motion.

*Martin*, *contra*.

By Court, RICHARDSON, J. The motion for a nonsuit cannot prevail, because the rule of pleading is established that defendant must take advantage of the nonjoinder of a co-executor by pleading in abatement after oyer the probate. This is the distinction where the plaintiff sues in right of another, and when he sues in his own right. In the latter case the omission may be cause of nonsuit, but not in the former: 1 Chitty, 13; 1 Saund. 291.

The verdict, too, as to the amount of damages, is supported by the testimony, which need not be more particularly narrated. This was a question for the jury, and the verdict is not enormous. As to the possession of the negroes by Charles Goodwin, it evidently appears from the evidence of Benjamin Sims that it was not adverse from the plaintiff's testator, but really his possession. But I hasten to the ground relied upon by the defendant, and seriously argued by their counsel, for a new trial, to wit: Because the jury presumed fraud in finding for the plaintiff, of which there was no proof. The question submitted to this court is, can the verdict, which deprives the children of Mrs. Goodwin of these negroes in favor of a *bona fide* purchaser for valuable consideration from C. Goodwin, her husband, and without notice of the settlement in trust, be supported by the testimony?

The facts were as follows: In May, 1799, Charles Goodwin, the husband, styling himself agent of Chamberlain, and John Goodwin, trustees of Elizabeth, the wife of the said Charles, purchased one of the negroes in dispute. In January, 1801, the said Charles Goodwin, styling himself as before, purchased

the other negroes. The consideration-money was said to be received of the trustees by the hands of the said Charles, and the negroes to be held in trust for Elizabeth, his wife, and her children. On the twenty-third of May, 1801, Charles Goodwin wrote to the plaintiff's testator, Ambrose Gordon, parts of which letter I will refer to. On the sixth of January, 1802, Charles Goodwin, in consideration of one thousand five hundred and fifty dollars conveyed the negroes named in the letter to Ambrose Gordon, under which conveyance his executrix now sues. The bills of sale to Charles Goodwin, as agent, are in his handwriting, and never recorded; nor does it appear that Ambrose Gordon could have had notice of them. The negroes appeared, of course, as the property of Charles Goodwin, who held possession of them and described them as his own property. This letter avows his pecuniary embarrassment. In this situation he sells the negroes, to all appearance his own, to A. Gordon. If Charles Goodwin, thus embarrassed, paid the consideration-money for these negroes to Hammond Richardson, out of his own pocket, though he took a bill of sale, which is kept in secret, for his wife and children, it would require a kind of hardihood to contend seriously that there would not be grounds to presume a fraud, even at common law. And we would much more readily conclude there was a fraud under the statute of 27 Eliz., made expressly to protect purchasers for a valuable consideration against mere voluntary settlements of that kind.

But did not Charles Goodwin actually pay the money out of his own estate? He did pay it; drew the bills of sale to himself; kept them in secret, and used the negroes as his own. On the other hand, he styles himself agent of certain trustees, which may suppose a trust fund. But are not these susceptible of easy proof? And can the mere expression of the husband, because put into writing, when he is himself charged with the fraud in covering his own estate, and deeply interested, can his mere expression be received as any proof whatever? I conceive not. But let it be called the expression of the vendor of the negroes; then he, too, must be sworn to these facts, else there is still no testimony. If a husband were allowed to cover his property against creditors and purchasers by so simple a device as naming trustees, calling himself their agent, and by the mere act of so doing assuming that there is a trust fund, the law, which is so watchful over mere voluntary settlements, would become literally blind. But besides the obvious neces-

sity and reason for disregarding the mere expression contained in the bills of sale, there are not wanting adjudications to show that in such cases evidence of the trust fund is required. The case of *Cadogan v. Kennett*, Cowp. 434, and those in 1 Mod. 76, and 2 Ves. 10 and 11, are, in my judgment, very strong. And according to the last case of *Gross v. Glode*, 2 Esp. 574, the court would require great strictness to prove the property purchased by the trust fund, after appearing as the husband's.

But suppose for a moment that there were trust funds, and trustees who actually authorized the appropriation of the wife's money in the purchase of these negroes; is there not great reason to say that they too have committed a legal fraud upon the purchaser in keeping the transaction a profound secret, and suffering their agent to exhibit the property to the world as his own, thereby assisting him to obtain money on a fictitious capital? It is assisting one man to cheat another, which is not allowable. In all such cases, the party aiding and assisting by furnishing another with the show of capital, makes whatever capital he so furnishes absolutely liable for so much as is obtained upon its credit. If the trustees have done so, they have committed a fraud upon A. Gordon, whose representative must recover the negroes or their value. And the resort of Mrs. Goodwin would be evidently to those trustees for their more than unguarded use of her trust fund.

The motion is unanimously dismissed.

BAY, NOTT, and GANTT, JJ., concurred.

COLOOCK, J., was absent.

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## STATE v. GORMAN.

[2 NOTT & MCCORD, 22.]

**LARCENY BY BAILER.**—Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*.

**INDICTMENT** for larceny of a horse, the property of one Tidwell. The facts were: Strother Tidwell, the son of the prosecutor, borrowed from the prisoner a horse belonging to a team which was in the prisoner's charge as an employee of the owner, and left his own (Tidwell's) team in charge of one Gandy. The next day the prisoner went to Gandy, and obtained from him one of Tidwell's horses, under pretense that he wanted to ride him a few miles to get hay for his team. It appeared in evi-

dence, however, that the pretense was false, as the owner of the team had a man employed to provide fodder for them. The prisoner rode the horse into another part of the state, and sold him, telling the purchaser that he had got him as a part of his father's estate, and telling others that he had swapped for him. It appeared also that the prisoner sometimes used an assumed name. After a verdict of guilty, the defendant moved for a new trial.

*Goodwyn and A. P. Butler*, for the motion.

*Stark*, solicitor, *contra*.

By Court, JOHNSON, J. This case has been submitted without argument, and ground of the motion being the general one that the verdict is contrary to law and evidence, without any specification, we are left to conjecture on what it is predicated.

The points made in the argument of the cause before the jury, in the court below, and those which I suppose are now relied on, were that a larceny could in no case be committed where the thing charged to be stolen came to the possession of the party charged by delivery of the owner; and admitting it might, that the evidence in this case did not satisfactorily show that the prisoner's design, in obtaining possession of the horse, was at the time felonious.

Whatever might have been the rule on the subject, there can be no question that at this day a larceny may be committed of goods obtained by delivery from the owner, if it was done *animo furandi*: 3 Chitty Crim. Law, 923; and the reasons and propriety of this rule appear to me too manifest to need illustration. If delivery by the unsuspecting owner was a sufficient excuse for the thief, however grossly fraudulent or felonious his intention might be, villainy would readily devise stratagems to obtain it, even from the most wary, and would be wholly destructive of that confidence and spirit of accommodation by which society is held together.

That the prisoner got possession of the horse, with the stealing of which he is charged, with a felonious intention, is determined by the verdict of guilty, and unfortunately for him, I think, it is too plainly manifested by the evidence. He obtained the possession of the horse from Gandy, in whose care he was left, under the strong claim that he had lent one the day preceding to Strother Tidwell, in whose care he was, pretending that he wanted to ride only a few miles to procure hay for the team, of which he had the charge; for which there

was no necessity, as they were supplied by one of the witnesses, who was employed by the owner to provide for them. He had but just got the horse into his possession, when he set up a claim to him by telling one of the witnesses that he had swapped for him; and he carried him directly off to Barnwell, where he immediately disposed of him, telling the purchaser that he received him as a part of his dividend of his father's estate, who had lately died, and moreover assumed a diversity of names, well calculated for that pursuit.

I am, therefore, of opinion that the motion must be refused.

COLCOCK, NOTT, GANTT, and RICHARDSON, JJ., concurred.

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### ALLEN v. HALL.

[2 NOTT & McCORD, 114.]

**MARRIAGE, PROOF OF.**—Evidence that two persons have lived together as man and wife is presumptive proof of a marriage, which may be rebutted, but is conclusive if not rebutted, and this is a question for the jury.

**IDEM—DECLARATIONS AS EVIDENCE.**—The declarations of persons living together as man and wife are admissible as evidence on the question of marriage, in a suit between the children and a grantee of the wife.

**PARTITION** for the division of a tract of land belonging to the estate of John Hall, who died intestate.

The defendants were the children of the intestate, and the plaintiff claimed as a purchaser from Margaret Hall, who was alleged to be the wife of the intestate. Pleas: 1. *Ne unques acisic*; 2. *Ne unques accouple*; 3. Statute of limitations. It appeared that John Hall and Margaret Hall lived together several years as man and wife, and by some were supposed to have been married. The defendants offered the declarations of John Hall to show that he was not married to the said Margaret; but the court rejected them. It appeared that the defendants had been in peaceable possession of the premises for ten or eleven years, and ever since the death of the intestate, and that the widow had left the state shortly after her alleged husband's decease.

The jury found a verdict for the plaintiff for one third of the premises; whereupon the defendants moved for a nonsuit and for a new trial, on the grounds: 1 That there was no proof of a marriage; 2. That the court erred in rejecting the declarations of John Hall; and on certain other grounds not necessary to be noticed.

*Pearson and Glendinin, for the motion.*

*Williams, contra.*

By Court, COLCOCK, J. It is unnecessary to take notice of any other than the second ground, as the court concur with the presiding judge on all the others.

In a question where there has been a marriage, proof that the parties lived together as man and wife, if not rebutted, will be conclusive. But this evidence is only presumptive, and like many other presumptions, may be rebutted by circumstances or positive proof. Where persons live together as man and wife, their declarations are for the most part given in evidence; and if these declarations be contradictory it will of course create doubt, and must be left to the jury to determine. As to the creditors and *inter vivos*, it is said the testimony ought not to be admitted. But as to the rights of either husband or wife, or their children, they are admissible.

It does not follow, because such declarations were made, that they should be conclusive. The time, place, manner, and an infinity of other circumstances will have their weight in determining the degree of credit which will be given to them. Perhaps they would be particularly liable to suspicion, when made by a man who had lived with a woman as his wife for a number of years. There can be no danger in admitting such testimony. It would never be required except in cases of doubt. There can be no interest in the parties from whom the evidence must come. Nor, indeed, any bias of the mind which would be calculated to lead to error. For where the interest of either the husband or wife is concerned, it must be the declarations of the one who is no more which are to be given in evidence; and they would not, therefore, be liable to suspicion, as it can scarcely be believed that such declarations would be made with a view to destroy rights, which can only exist after the person making them shall be dead, and where the rights of children are concerned. The security is, that no one, however base, is disposed to render himself more so by false assertions. But who could complain of the admission of such testimony? Surely not the woman who has placed herself in a suspicious situation. She could easily have prevented this by pursuing a virtuous and honorable course. And this may be urged as an additional reason for the admission of the testimony, that it will tend to repress vice.

In the case of *Goodright v. Moss*, Cowp. 593, ejectment for

two messages, two questions arose: 1. Whether the father and mother could have been examined, if alive? 2. Whether their declarations, after their death, can be admitted as evidence? Howarth and Jones showed cause and insisted that the testimony of parents in their life-time, or their declarations after their decease, might be admissible in cases where proof of the marriage was presumptive only, as by cohabitation or general reputation. Lord Mansfield decided in this case, that the declarations of the mother were admissible, and a new trial was granted. In the *King v. Inhabitants of Bramley*, 6 T. R. 330, the wife was offered to prove she was never married, and the declarations of both husband and wife to the same purpose. The court below rejected the evidence. Lord Kenyon, stopping the counsel for the motion, said: "This evidence was certainly admissible, though the justices at the sessions were to judge of the effect of it. In the case of the *King v. The Inhabitants of St. Peter's*, it was expressly held, that the supposed husband was a competent witness to disprove the marriage. There are also many other cases of this kind, but in all of them such testimony is open to great observation:" See *Mace v. Cadell*, Cowp. 282; Phillips, 176, 177.

The motion is, therefore, granted.

NOTT, JOHNSON, and RICHARDSON, JJ., concurred.

See note to *Londonderry v. Chester*, 9 Am. Dec. 61, where this subject is examined.

## STATE v. HATTAWAY.

[2 NOTT & McCORD, 112.]

**PERJURY—MATERIALITY OF TESTIMONY.**—To constitute perjury, the matters sworn to must be material to the issue; and although the particular fact as to which the witness is alleged to have sworn falsely need not be material *per se*, it must have a direct and immediate connection with some material fact, so as to give weight to the testimony.

**SAME.**—Where a witness swore to a particular fact which was material, and that he was present when it occurred, and afterwards, when asked where he lived at the time, testified that he lived near the parties, which was proved to be false, it was held that this was too remote from the issue to constitute perjury.

**INDICTMENT** for perjury. The facts were: One Shackelford having been indicted for stealing a cow, and afterwards discharged, brought an action against the prosecutor for malicious prosecution. In this action Hattaway was called as a witness,



and testified that Shackelford purchased the cow in question from one Carter, and that he was present at the time. Being asked where he lived at the time, he said, "near Carter's, perhaps within a hundred yards," whereas it was proved that he did not live in the state. The perjury assigned was his false testimony as to where he lived. Nott, J., instructed the jury that the testimony was not material so as to constitute perjury, but the jury thought otherwise, and found the defendant guilty. The prisoner then moved to set aside the verdict as contrary to law.

*B. A. Taylor*, for the motion.

*Evans*, contra.

By Court, Nott, J. It seems to be agreed by all the writers on criminal law, that one ingredient in the crime of perjury is that the oath relate to some matter material to the question in issue: 4 Black. Com. 187, 138; *Rex v. Aylett*, 1 T. R. 69. There can be no doubt but that an extra-judicial oath, or one relating to a matter utterly immaterial, or even an impious oath, taken in idle conversation, may be as offensive in the eye of heaven as the most solemn oath taken in a court of justice. But there are many offenses against morality and religion which are not cognizable in courts of justice. For such offense, a man is answerable only to his God, and not to the laws of his country. And our duty is to determine what the law considers a public offense, and not to declare what ought to be so considered.

There is no offense the general character of which is better understood than that of perjury; and no point better settled, perhaps, than that the oath must relate to some fact material to the issue. When I say it must relate to some fact material to the issue, I do not mean that the particular fact sworn to must be immediately material to the issue, but it must have such a direct and immediate connection with a material fact as to give weight to the testimony to that point. As where it became material to identify a flock of sheep, and a witness was asked how he knew the sheep in question to belong to a particular individual, he said because they were in his mark. Now although they were not in his mark, and although the mark was immaterial, yet as that was the medium through which the witness arrived at his knowledge of the important question, it had a direct tendency to strengthen his testimony, and was therefore material. So in the present case, if the defendant's situation had given him a better opportunity of becoming acquainted

with the material point in the case, testimony to that fact might have been considered material. Thus if the question had been whether Carter had made a good crop that year, or whether his overseer had done his duty, his testimony to those points might have been strengthened by the fact of having lived near him; because it furnished him with the means of knowing with more certainty the truth of those facts.

But it is not so with the case now under consideration. The material fact was, whether Carter actually sold the cow to Shackelford. If the defendant lived a hundred miles off, and was present at the sale, he was a competent witness to prove it. If he lived within fifty yards, and was not present, he could know nothing of the matter. It was not a fact of such a nature as to be better known to him, in consequence of the contiguity of residence. It may sometimes be difficult to determine how far the evidence of a particular fact may go to strengthen the testimony of a witness, to a more material point in a case; and perhaps no precise and definite rule can be laid down on the subject. In all cases, therefore, so highly penal, where the question is of a doubtful character, I should incline to favor the side of the accused. In the case now under consideration, I cannot conceive that the testimony was either directly or indirectly material to the issue. I am of opinion, therefore, that a new trial ought to be granted.

There were several other grounds taken in the case, which it is unnecessary to consider.

COLOOCK, JOHNSON, RICHARDSON, and GAWTT, JJ., concurred.

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## REID v. HOOD.

[2 NOTT & MCCORD, 168.]

**JUDICIAL LIABILITY.**—A judicial officer is not liable for an injury occasioned by an error of judgment on his part, in proceedings before him.

**ACTION** of trespass for wrongfully issuing an attachment whereby the plaintiff's horse, saddle and bridle, were seized and sold. The defendant, Burdine, a justice of the peace, issued the attachment against the plaintiff, at the suit of Hood, the other defendant, and made it returnable before himself. The debt was above fifteen dollars. The plaintiff claimed that under the attachment act, the justice should have made the process returnable at the next term of the district court, and that a justice's jurisdiction, in cases of attachment, was

limited to three pounds. It was proved, that when Burdine was informed that the plaintiff was about to sue him, he said he thought he might be doing wrong, but that he was safe, having taken a bond of indemnity.

Richardson, J., instructed the jury that the defendant, Burdine, was not liable, unless he had done wrong willfully, and that Hood was not liable if the justice was not. Verdict for the defendants. The plaintiff moved for a new trial: 1. Because the justice was liable for assuming jurisdiction, whether knowingly or not; 2. Because the evidence showed that Burdine knew that he was wrong; 3. Because one of the jury, unknown to the plaintiff, had received, upon a debt due him from the plaintiff, a part of the proceeds of the sale of the property, and was therefore interested in upholding the proceedings.

*B. F. Earle*, for the motion.

*McDuffie*, *contra*.

By Court, RICHARDSON, J. The first ground requires this court to consider whether a judicial officer is liable for any injury which may come to a party, by reason of any error of judgment which the officer may have committed by his adjudication in a trial before him? There is no view which can be taken of this inquiry that does not answer it in the negative. The essential and characteristic distinction between a judicial and a ministerial officer is that the former is to give judgment, which requires perfect freedom of opinion; but the latter is to execute which supposes obedience to some mandate prescribing what is to be done; and leaving nothing to opinion.

Now, as opinion on any subject is various and uncertain, we cannot direct the judgment, but must leave it to the honest dictates of the officer's peculiar intellect, upon information acquired, and both information and intellect are so different in different men, that it is vain to look for the same correctness of adjudication. In all judicial questions, then, the very aim and duty of the officer is to give his true opinion, after due inquiry; if erroneous, he can no more answer for the error than for the head which heaven has given him. All we ask of such an officer is the just picture which has been impressed upon the tablet of his intellect by the facts and the law together; and however discolored and distorted it may come out, yet, if it be the true image of his intellectual impression, we get just what we require, and all that he can give. Opinion, then, having no

fixed test nor measure, no equal scales, nor weights, all we can answer for is its honesty.

Turning from the intrinsic character of the judicial officer, let me ask if there is a known instance of a judge being rendered liable for a mere error of judgment; I believe not one. Nor does the immunity I have alluded to, belong to judicial officers, properly so called, alone. It belongs, I conceive, to every one whose mere opinion is called for, whatever may follow from the opinion offered. Suppose a counsellor to err in his opinion, is he liable? Never; unless willfully wrong or negligent, or at least convicted of such ignorance as shows a depravity in undertaking to give an opinion.

Suppose a jury to give an unfortunate and mistaken verdict; or the governor, in a question referred to his opinion, were to commit an error, to my injury, or a legislator to introduce a law which brings down ruin upon me; and suppose either of these were sued at law; what would be the only safeguard in a court? Simply that his opinion being required, he honestly gave it as dictated by duty. At the same time, there is no doubt that an extreme wildness of opinion may prove a depravity, or a wanton disregard of doing a wrong, either of which may make any officer liable. The pretense of ignorance, or the mantle of opinion, cannot protect or hide enormities. These would, in themselves, prove the heart depraved, and not the head merely mistaken. And then as it was observed to the jury in the case before us, the judicial officer would be liable to any extent; and perhaps become more culpable than any other whatever; evidently, I think, because there is reposed in him higher confidence and greater discretion, and touching these, he, of course, commits greater treachery than others whose integrity is less confided in.

Let us turn now to the probable effect of holding a judicial officer accountable for errors of judgment. Errors, not a few, he must, of course, commit, and many more in the opinion of those who judge his acts. His post would not be tenable by the ablest, for pecuniary ruin must attend his best exertions; while he, in turn, would pursue those who misjudged his judgment. Suppose, for instance, the judge and jury had given judgment, for a mere mistake, against the justice, in the case before us; might he not in turn have sued this judge and jury for their mistake? And judgment being rendered for or against these, no matter which, the losers would have a right still to pursue in like manner their mistaken judge and jury, and so on to infinity. If there could be a sea of litigation,

wide, deep and stormy, we should have it here, and all that I have noticed, the well meaning magistrate and the faithful counsellor, the honest juror, and the upright judge, the patriotic statesman, and the magnanimous governor, steeped in litigation, would be all adrift on a perilous deep. No doubt some few would still venture out, but could we find a Palinurus able to swim three days and three nights to catch even the glimpse of his destination; without hyperbole, would not any judicial officer become interested to do no business? And what an interesting feeling might it not introduce interchangeably to cloak each other's errors; for man is man, and the selfish principle rules him.

As to the second ground, I have already said, if the justice acted willfully, he is liable; and certainly when a judicial officer takes a bond of indemnity for his acts, it is good proof that he suspected his own proceedings were erroneous. It is very reprehensible indeed. But many of these justices, though honest, are so ignorant, and are yet so indispensable, that we cannot, after the jury have found that the defendant's error was not willful, consent to give a second chance to a hard action. The error, too, is not palpable. Justices have jurisdiction in cases of attachments to three pounds, and many imposing arguments of analogy may be drawn, both from the constitution and from decisions upon the extent of their jurisdiction, to show that it is extended to twenty dollars, even in such cases, and the very doubt is some excuse. And though I may still suspect all that was meant by that bond did not meet the eye, and though he probably went beyond his jurisdiction, which is much against him, yet, after the verdict at least, I am disposed to treat justice Burdine with the forbearance toward his errors recommended by Sir William Blackstone, vol. i, 354, to be observed toward justices generally.

And although I cannot add with the good Prior (speaking of women), "let all their ways be unconfined," yet I will say with him: "Be to their faults a little blind, and to their virtues very kind."

Upon the third ground, there is scarcely such an interest in the juror as to render him incompetent to try the case. And were it greater, it is too late to take advantage of it after the trial, without notice to the jurors, as has been before decided.

The motion is dismissed.

COLCOCK, NOTT, GANTT, and JOHNSON, JJ., concurred.

## MACKEY v. COLLINS.

[2 NOTT &amp; MCCORD, 186.]

**BREACH OF COVENANT BEFORE EVICTION.**—Where a grantor conveyed certain land in fee, and covenanted “to warrant and forever defend the premises to the grantee, his heirs, etc., against every person whomsoever, lawfully claiming, or to claim, the same, or any part thereof,” it was held that the grantee could maintain an action for a breach of covenant before eviction, by showing a paramount title in a third person.

**ACTION** for breach of a covenant in a certain deed. The declaration alleged that the defendant’s testator, by deed dated November 25, 1811, in consideration of one hundred and forty dollars, granted, bargained, sold and released to the plaintiff a certain tract of land to hold in fee, and bound himself, his heirs, executors and administrators to warrant and forever defend the premises to the plaintiff, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof; that at the time of said sale the testator did not own the land, but that the same belonged to one Baker, who lawfully claimed it, and that the testator refused to warrant the said land against the said lawful claim, and had thereby broken his covenant. Plea, *non infregit conventionem*. The court ordered a nonsuit on the ground that the action could not be maintained until there had been an eviction at law; whereupon the plaintiff moved to set aside the nonsuit, for the reason that the existence of the outstanding paramount title was a breach of the covenant without eviction.

*Blanding*, for the motion.

*Mayrant*, *contra*.

By Court, NOTT, J. The covenant in this case is not in express terms a covenant of seisin, neither is it a covenant for quiet enjoyment. The question therefore is, what is the effect of a covenant couched in the terms that this is? If it was to be determined upon the authority of English decisions, perhaps the event would be doubtful, though there are cases in the English books which strongly favor the opinion attempted to be supported by the plaintiff’s counsel: 10 Mod. 142; Hobart, 12; 1 Selw. 442; Carth. 97; 1 Salk. 137; 1 Selw. 478.

But we need not perplex ourselves with a display of legal lore, since the question appears to have been well settled by the practice and decisions of our own courts. In the case of *Pringle v. Witten*, the courts held that an action would lie

before eviction: 1 Bay, 256 [1 Am. Dec. 612]. It is true that in that case the defendant's testator had covenanted that he was seised in fee. But in the opinion of the court, after observing "that in a covenant for peaceable enjoyment, or on a general warranty, the action would not lie at common law, without a previous eviction;" they say, "in a case where title and quantity are both warranted, that doctrine does not apply." They further observed, "in the latter cases, wherever there is a covenant for good title, and for the whole quantity, in each of these cases, the action of covenant would lie," without eviction: 1 Bay, 259.

I do not know what can be meant by "a covenant for good title and for the whole quantity," if the covenant in question is not one. With regard to what was observed of a covenant of peaceable enjoyment, it was not a point before the court; therefore there was no necessity for the judges to have given an opinion upon it.

The case of the administrators of Bell against the administrators of Higgins, was an action of debts on bond for the purchase-money of a tract of land in which the defendant was allowed to set up the breach of warranty by way of defense: 1 Bay, 326. In this case also, there was a covenant that the grantor was lawfully seised; and I quote it only to show that the ground taken was, that as the party was entitled to an action covenant before eviction, he was entitled, under the same circumstances, to set up the breach of covenant by way of defense. And I take it that the converse of the proposition would hold good. A party cannot avail himself of such a defense until the covenant is broken, and as soon as the covenant is broken, he is entitled to an action. And if he can prove a breach of covenant in one case by showing a title paramount in another person, without eviction, he can in the other. The principle in both is precisely the same.

In the case of *Sumter v. Welsh*, 2 Bay, 553, the action was for the purchase-money, and the warranty was the same as in the case now under consideration, yet the court allowed the defendant to show a title paramount in another person, although there had been no eviction.

In the case of *Mitchell and Vaughan*, which was an action of the same description, the same defense was allowed, although resisted on the same ground that the action now is. Since that time the cases have been numerous. They have indeed passed without opposition, because the law was thought to be too

firmly established to be questioned. And if we are to set aside decisions which have been solemnly made, and which have been universally acquiesced in for fifteen years, we shall never know when to consider the law as settled. These decisions are entitled to more than ordinary respect on account of the extensive class of cases which they embrace.

The most of the deeds now drawn in this state are according to the form prescribed by the act of 1794, in which the covenant is in the same words as in the deed now before us; and this sort of defense is of such frequent occurrence, and that without any regard to the particular nature of the covenant contained in the deed, that it may be considered as one of our best settled rules of law and practice. Indeed, it is a principle so deeply ingrafted into the body of our law, that to extirpate it would be attended with mischief, little less than the abolition of the first rule of evidence.

I am of opinion, therefore, that the nonsuit ought to be set aside.

COLCOCK, JOHNSON, and RICHARDSON, JJ., concurred.

See a similar decision in *Hamilton v. Outte*, 3 Am. Dec. 222.

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## DOUGLASS v. SPEARS.

[3 HOTT & McCORD, 207.]

**SUFFICIENCY OF MEMORANDUM.**—An agreement to deliver cotton, signed by the defendant alone, is a sufficient memorandum of the contract to take the case out of the statute of frauds.

**ASSUMPSIT**, founded on the following argument:

“I hereby engage to deliver J. K. Douglass & Co. seventy square bales of cotton, all in good order, ten days from this date, at Sumter's landing, they allowing me twenty-five cents per pound, payable sixty days from date of delivery; as many of the bags as are rent, I engage to have all mended before delivery, and if the sample sent does not meet Mr. Douglass' approbation, this agreement is not considered as binding, only I am to have notice in two days from this date to that effect, this twenty-eighth March, 1817. CHARLES SPEARS.”

The declaration alleged that the sample was approved within the time specified, and due notice given to the defendant, but that defendant had not delivered the cotton, or any part of it. It appeared in evidence that the plaintiffs were ready to receive the cotton at the time specified, and had used due diligence to



obtain a delivery of it, sending first a boat and afterwards some wagons to get it. It also appeared that there had been a rise in the market price of cotton. The plaintiffs insisted upon their right to recover the difference between the price agreed on, and the increased market value.

The jury found for the plaintiffs four hundred and thirty-six dollars and twenty-six cents, and the foreman stated that they had allowed for wagon hire. As the declaration made no claim on that score, the presiding judge recommended that the jury reconsider their verdict and deduct the wagon hire, whereupon the jury returned a verdict, diminished by one cent.

The defendant moved in arrest of judgment; First. Because the agreement not having been signed by the plaintiffs, was not binding on the defendant; and, second, Because the agreement was *nudum pactum*, there being no mutuality of consideration; and also for a new trial on grounds which sufficiently appear from the opinion.

*Levy, for the motion.*

*Blanding, contra.*

By Court, GARR, J. It is difficult to conceive, when reference is had to the contract entered into by the defendant in this case, how an opinion could be entertained that it was not mutually binding between the parties. It is a contract on the part of the defendant to deliver cotton at a certain time, to be paid for at a certain time and price by the plaintiffs, with a condition annexed in favor of the plaintiffs, whereby they are not to be bound by the terms of it should they disapprove of the sample of the cotton, which was sent for inspection. The contract is one in *presenti*, subject to this defeasance alone, on the part of the plaintiffs.

The sample of cotton, however, was approved of, and the defendant had notice within the prescribed period of two days, a fact averred in the declaration, and satisfactorily established in proof. It is supposed that because both parties did not sign this written contract, that therefore it was not obligatory upon the one who did. The case of *Egerton v. Mathews*, 6 East, 307, answers the objection. There the action was brought upon the following memorandum in writing:

"We agree to give Mr. Egerton nineteen pence per pound for thirty bales of Smyrna cotton, customary allowance. cash three per cent.. as soon as our certificate is complete.

(Signed) "MATHEWS & TURNBULL."

It was there contended that the contract being altogether executory, and no consideration appearing on the face of the writing for the promise, nor any mutuality in the engagement, it was void by the statute of frauds. Lord Ellenborough said, "this was a memorandum of the bargain, or at least so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute requires." The first ground in arrest of judgment must fail.

On the second ground in arrest, it is almost unnecessary to say that this contract cannot be considered in the light of a *nudum pactum*. Any degree of reciprocity will prevent the agreement from being considered in that light. Here the consideration was expressed, and considered by the defendant as the full value of the article which he contracted to deliver.

The objections in arrest of judgment being disposed of, the first ground taken for a new trial, and which is bottomed on a supposed want of validity in the contract to bind the defendant, must fall with them. In regard to the second ground for a new trial, that the jury found damages for boat and wagon hire, this at the utmost is conjectural. It does not appear by the verdict, and the observations made by the court to the jury, and the alteration of the verdict thereupon, afford ground to believe that no allowance was made for wagon-hire. They may have allowed, and probably did, damages on account of the demurrage of the boat, and this they had a right to do. Nor are the court prepared to say, in a case of this kind, where the party goes for general damages, that the jury might not have taken into their consideration disappointment on account of the wagons which had been sent for the cotton.

The observations of the presiding judge grew out of the impulse of the moment, and were introduced *ex majori cautela*. The evidence disproves the correctness of the third ground taken, as it was beyond doubt express and satisfactory, that defendant had notice that the sample was approved of by Douglass within the two days.

The defendant, therefore, can take nothing by his motion and this is the opinion of the court.

COLCOCK, JOHNSON, and RICHARDSON, JJ., concurred.

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The doctrine of this case is generally sustained. See note to *Merrill v. Olason*, 7 Am. Dec. 286.

## STATE v. HELFRID.

[3 NOTT &amp; MCCOMB, 232.]

**STATUTE CONFERRING JURISDICTION.**—An act giving the recorder of an incorporated city jurisdiction of certain misdemeanors and civil causes within the city is constitutional.

THE opinion states the case.

*Hayne, attorney-general, for the state.*

*White and Desaussure, for the defendant.*

By Court, JOHNSON, J. The defendant was indicted, tried and convicted in the inferior city court of Charlestown, for retailing spirits without a license, contrary to the act of assembly in such case made and provided, and a motion was made in this court to arrest the judgment. There are several cases on the docket which depend on the questions involved in this case, and the grounds stated in the briefs which have been furnished, are so multifarious and diversified that it would be inconvenient to introduce them here, and they are deemed unnecessary, as the case may be more conveniently considered and better understood by confining it to a general division of the principles involved in the various questions made.

They present the following points:

1. Whether the judge of that court (the recorder of the city) has been appointed in such a manner as to authorize the legislature, by act, constitutionally to confer on him the judicial power under which he claims jurisdiction of this cause and others of the same class?

2. Whether the sheriff of that court is constitutionally appointed; and, if not, whether the whole proceedings of the court are not illegal and void?

3. Whether the mode of proceeding by indictment is authorized by the act creating the offense?

Before entering on the question in relation to the appointment of the judge of the inferior city court, and the jurisdictions of that court over the offense charged in the present case, it will be necessary to take a cursory view of its organization and the act by which the jurisdiction is conferred.

By the act of incorporation, and those amendatory, the corporation were authorized to elect an intendant and wardens, and a recorder, and certain other officers and generally, "all other officers they might deem necessary and proper," etc., and the judicial powers were vested in a court denominated a court of

wardens. This court was afterwards abolished, and in its stead the legislature, in 1801, established the present court, giving to it jurisdiction of all civil causes arising within the city as far as one hundred dollars, concurrent with the court of common pleas, and over all offenses against the by-laws, and constituted it a court of record. This act also provides that it shall be "called the inferior city court, and be held by the recorder of the city of Charleston, and that the city council shall provide and fix such compensation for the recorder as may be fit and proper, and proportioned to the importance of his station, and which compensation shall not be increased nor diminished during his continuance in office, to be paid by the city tax, and the said recorder shall hold his commission during good behavior." It also provides that all cases above the jurisdiction of a magistrate shall be tried by a jury, and points out the mode of forming a jury, and in fixing the fees of the officers of the court, recognizes such an officer as a sheriff in that court. Under this act the recorder is elected, and in pursuance of the city ordinance he is commissioned by the intendant accordingly, and in this instance, as has been lately the usage, he was also commissioned by the governor.

The act under which that court claims jurisdiction of the present cause was passed in December, 1812. It provides "that the inferior city court of Charleston shall have concurrent jurisdiction with the court of sessions in all cases of misdemeanor, assault and battery, arising within the city of Charleston; also in all cases of trover, detinue, replevin, and trespass, arising within the said city, to the amount hereinafter specified; and the said inferior city court shall have jurisdiction in civil causes to the amount following: No verdict shall be given for a greater sum than five hundred dollars, exclusive of costs; but any not exceeding five hundred dollars, exclusive of costs, shall be and the same is hereby declared to be within the jurisdiction of this court, whether the same be damages or the balance of mutual demands or single cause of action, "and confines this jurisdiction to persons resident within the city," etc. The third clause of the act also provides that the judge of this court "shall have the same powers in the discharge of his duties as the judges of the court of sessions and common pleas in like cases, and the proceedings in criminal and civil cases over one hundred dollars shall be substantially the same as in the courts of sessions and common pleas," and an appeal is given directly from that court to this.

Under the authority of the acts of incorporation no one will question that the corporation had the power to elect both a recorder and a sheriff, and the question involved in the first point is resolved into the inquiry whether the act of 1818, conferring this increased jurisdiction over cases and offenses relating to the laws of the state, is constitutional or not? As preliminary to this question I will merely remark, that it is an axiom that does not now require the aid of reasoning to vindicate that the legislature of the state, as the representatives of the people, possesses unlimited power over all subjects of legislation not taken away by the constitution; inasmuch, therefore, as they are not forbidden by that instrument, they had the power to pass the act of incorporation and to confer on them any privileges within the pale of legislation, and among other things, which no one has pretended to deny, the power to elect a recorder and to constitute a tribunal to decide questions arising under their by-laws.

Let us then inquire whether the legislature are forbidden to transfer a part of the jurisdiction of the courts of the state to a tribunal thus constituted. By the first section of the third article of the constitution it is provided "that the judicial power shall be vested in such supreme and inferior courts of law and equity as the legislature shall from time to time direct and establish;" and the first section, sixth article, provides in respect to the judiciary "that the judges of the superior courts shall be elected by joint ballot of both houses, and that all other officers shall be appointed as they hitherto have been until otherwise provided for by law." Inferior as well as superior courts are expressly provided for, and the mode of appointing the judges of the superior courts is prescribed, but that of appointing the judges of the inferior courts is nowhere pointed out. It would therefore follow even from the axiom laid down that the legislature had the power of providing for it, and the last section quoted, moreover, expressly gives them the power under the terms "all other officers." Under this authority they have by law authorized the corporation to elect a judge of the inferior city court, or in other words, conferred the jurisdiction exercised by that court on the recorder; as a judge, therefore, entertaining jurisdiction over subjects belonging, in the language of the constitution, to an inferior court, the constitutionality of his appointment cannot, I think, be questioned.

But, it is said, that he is exclusively the creature of the corporation, and therefore not entitled to decide on questions over-

which they possessed no power. This may be true so far as he derives his power from them, but the very act under which he is authorized to take cognizance of this cause *pro hac vice* constitutes him an officer of the state, and he may be literally said to be serving two masters, the corporation and the state; the former, in respect to the power derived from it, and so, as to the latter.

If this view of the subject be correct, it follows that the judge has been appointed and commissioned constitutionally and legally to hold an inferior court, and it only remains to be inquired whether it becomes superior in consequence of the powers conferred upon it by the act under which this prosecution was entertained? The words superior and inferior as here used, do not belong to any class of the acts which circumscribe their meaning, and must, therefore, be received in their ordinary acceptation, and in relation to this subject, the former may be defined to be that jurisdiction which possesses a controlling power, over all others, and the inferior, that which is subordinate to it.

Let the powers of the two courts then be tested by these definitions. The courts of common pleas and sessions possess unlimited jurisdiction over all questions arising on either side; every citizen is amenable to them, and in territorial extent it is bounded only by the limits of the state; and moreover, exercises a controlling power over all subordinate jurisdictions.

The city court, by the act creating it, is denominated the inferior court; its limits are confined to Charleston and its inhabitants, and its jurisdiction in criminal cases to that class of offenses denominated misdemeanors, and in civil cases five hundred dollars. If this comparison be just, its inferiority is manifest.

But it is said, that the unlimited jurisdiction conferred on it in this respect to misdemeanors, is superior, inasmuch as the court of sessions could not control it in relation to them. The conclusion is just, but the argument, I think fallacious; for if to have concurrent jurisdiction with a superior court over a limited class of cases of inferior grade, constitute the inferior court its equal, the distinction is idle and useless, for all the courts and jurisdictions in existence at the adoption of the constitution and since organized, possess, in some measure, concurrent jurisdiction; thus from three pounds to twenty dollars, the jurisdiction of the common pleas and a single magistrate is concurrent. The county courts, the judges of which were ap-

pointed by the nomination of the legislature, had, at the adoption of the constitution, and continued to exercise jurisdiction concurrent with the courts of common pleas and sessions, to an unlimited extent, over all actions arising on liquidated demands, and all crimes and misdemeanors, except criminal cases, where loss of life or murder might be inflicted, until they were abolished in 1798, and with all these powers, no one ever entertained a doubt that they were inferior courts, and subordinate to the courts of common pleas and sessions; nay, if we regard the *res gestae* as entitled to any influence, this jurisdiction was that expressly referred to in the constitution under the denomination of inferior courts.

Again, it is urged, that this court cannot control the inferior city court in the exercise of the jurisdiction given by this act, inasmuch as the act itself declares the jurisdiction concurrent with the courts of common pleas and sessions, and vests the same powers in the judge over them, and that therefore that court becomes superior in respect to those powers. But I think this is no test of superiority. The only power which a superior court can legally exercise over any inferior or limited jurisdiction, except by way of appeal, is to keep it within the pale of circumvallation drawn around it; and within it the jurisdiction of a single magistrate is as omnipotent as the house of peers in England. And the true distinction between the courts of superior and inferior jurisdiction, consists in the right of the superior to control the inferior, in the usurpation of power which may always be safely exercised where there is a limited jurisdiction, whether that limitation is confined to subjects of litigation or persons.

It may be said, that pursuing this course of reasoning to an extreme, a jurisdiction might be thus created, treading so closely on the heels of the courts of sessions and common pleas, as to render it difficult to distinguish their footsteps. But so long as there is a jurisdiction possessing a controlling power over it, the judges of which are appointed in the manner prescribed by the constitution, the citizen has all the security which was deemed necessary, and which is provided by the constitution; and for myself, I am unable to discover any provision in the constitution which precludes the legislature from providing by law, for a court exercising unlimited jurisdiction, and for the mode of appointing a judge, so long as there is a jurisdiction to which it is subordinate; and I think this view is fully supported by the powers exercised by the county courts,

in many cases their jurisdiction was unlimited, and if they might in one instance inroach on the jurisdiction of the common pleas and sessions, I see no point at which they might be arrested.

The objection to the illegality of the proceedings of the court, on the ground that the sheriff was not constitutionally appointed, is not specifically pointed out by the briefs, and the only one urged at the bar was, that by art. vi., sec. 2 of the constitution, it is provided that "sheriffs shall hold their offices for four years, and not be again eligible for four years," etc., and that the sheriff of this court, by the by-laws, is elected every year, contrary to this provision of the constitution. I do not see how this question can affect the case under consideration in any view. A sheriff is not otherwise necessary to a court than to execute its orders and its process; he certainly has no participation in the judgment of the court, and if there had been no sheriff, I see no reason why the court would not be at liberty to pronounce its judgment. But giving the objection its full weight, it is equally unavailing. If the sheriff elect was disposed to insist on it, it might become a question whether he was not entitled to hold it, under this provision of the constitution, for four years, but no one, I think, will seriously doubt that he may not safely and constitutionally hold it for one.

The remaining question relates to the mode of proceeding. The remedy prescribed by the act creating this offense is by "bill, plaint, or information."

There is no doubt about the principle, that when an act imposes a penalty, and points out the mode of proceeding, it must be pursued, and the only question is, whether a bill of indictment is covered by the term bill in the act. Bill, as a generic term, would necessarily include it. But it is argued that when used in an act, it has a precise technical meaning, and is applied to a species of private proceeding in use in the courts in England, and the English authorities produced would seem to justify this construction; but that process, so far as I can learn, has never been in use in this state, and certainly is not now, and there is no other proceeding in the court of sessions, coming within the general term bill, but an indictment, and there was no other to which it could apply, and it is a fair conclusion that the legislature did not intend it to be understood as mere idle verbiage. But if usage may be permitted to influence the construction of a term, there never was one better settled. From the passing of the act up to this day, the attorney-general



and solicitors have uniformly prosecuted by indictment for this offense.

It is said, however, that it has been otherwise ruled by this court, and cases have been referred to as decisive of the question. Were I satisfied that it was so, however reluctantly, I would readily yield my own opinion in conformity to the general principle which governs this court, never to depart from its adjudications, except from the most imperious necessity, but the cases were decided at a time when the opinions of this court were delivered *ore tenus*, and were forgotten as soon as the occasion which gave rise to them had passed away, or preserved only by imperfect memoranda, hastily made, and probably remodeled from memory long after. I think, therefore, that the evidences of these decisions are too equivocal to justify the court in departing from what I conceive to be law, sanctioned by the most inveterate usage, and indeed I cannot, by the utmost stretch of liberality, reconcile these supposed decisions with so uniform a practice, both anterior and subsequent.

BAY, J. I concur upon all the grounds, but that upon the indictment, which is considered as settled.

RICHARDSON, J. I dissent, upon the ground that the act gives to the city court no cognizance of any misdemeanor, except that of assault and battery.

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As to the constitutionality of an act increasing the jurisdiction of a justice, see *Beers v. Beers*, *ante*, 186.

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## TORRE v. SUMMERS.

[2 NOTT & McCORD, 267.]

**CRIMINAL CONVERSATION—PRIOR UNCHASTITY OF WIFE.**—In an action for criminal conversation the defendant may give in evidence facts showing previous unchastity in the wife.

**IDEM—PARTICEPS CRIMINIS AS WITNESS.**—Want of chastity in the wife prior to her seduction by the defendant in an action for criminal conversation may be proved by one who has had criminal intercourse with her, if the witness do not object.

**DAMAGES FOR CRIMINAL CONVERSATION.**—In an action for criminal conversation, the damages are in the discretion of the jury, and the verdict will not be set aside because they are excessive.

**ACTION for criminal conversation.** At the trial it was proved that the wife had eloped, but with whom it did not appear. There was evidence, however, that the defendant had been seen

to kiss her before her elopement, and had declared that when he was rich enough they would live together, and that subsequently they did live together. The defendant offered to prove that after her elopement, and before she began living with him, she had committed adultery with other men, but the court rejected the evidence. The defendant also asked one of his witnesses whether he had not had criminal intercourse with the wife, without naming any time, and the court overruled the question. The jury found a verdict for the plaintiff for five thousand dollars damages. The defendant moved for a new trial on the ground of the rejection of the testimony above-mentioned, and also because the damages were excessive.

By Court, RICHARDSON, J. This is but the second instance in which such a case as the present has been laid before the constitutional court. Upon its general character and tendency, and the feelings it is calculated to excite, there can be but one opinion and one wish, *i. e.*, the anticipation that the case can seldom arise, and the hope that it will not be brought without both merits and a prudential consideration of the exposure incident to such actions.

Though it is not absolutely necessary to discuss the ground of excessive damages; yet, I will notice the rule which should govern. And in so novel a case, I will not refrain from the reflections arising from the subject, before examining the points of strict law.

I know of no instances in which courts have granted new trials on account of excessive damages given in suits brought for criminal conversation: *Duberty v. Gunning*, 4 T. R. 659. And that practice has great intrinsic reason. Examples of chastity have the happiest effects, because man is at least emulous of virtue; while instances of incontinence produce the worst, because the passion that leads to it is universal. And however true it is that there is no enjoyment so great as that which is innocent and restricted; yet, under the incentive of example, this passion scarcely acknowledges any bounds.

The practice of judges in disallowing new trials upon the ground of the mere excess of damages, wherein the appeal is entirely addressed to discretion, is doubtless founded much upon the consideration that the order and happiness of society depend greatly upon continence in both sexes. Strictly speaking, too, by the seduction of a wife, the positive loss to her husband is very great. Under the rules of law he cannot, while

the first is alive, take a second wife; his loss is, therefore, greater than if she was destroyed altogether. The wound inflicted on his peace of mind is deep and lasting. "The spirit of a man may sustain his infirmity (his bodily ills and misfortunes), but a wounded spirit who can bear?" And though the "wounded spirit" means conscious guilt, yet dishonor is nearly allied to it.

The great writer, who for his keen inspection, "deep through the human heart," deserves the distinguished encomium of nature's boast, is most just when he says: "he who filches from me my good name, etc., makes me poor, indeed." For, with good name, man has lost the great means of success and usefulness in life. The former the object of the selfish, the latter the noble aim of the generous. But how much poorer does he make me, who with the disrepute which provokes unfeeling scorn, instills that inward sense of dishonor, which, like the "wounded spirit," none can bear. Would the seducer ask himself what damages would requite him, were he the injured husband, he would probably conclude that as the brutal ravisher of a woman should be prepared to meet death, so the deliberate seducer of his neighbor's wife cannot look for less than pecuniary ruin, and he would then too admit that society should be as ready to recompense the injured husband, and to punish his wrong-doer as the immediate sufferer himself. Would he, when practicing arts of seduction, but ask himself what would be his feelings were his wife or his daughter defiled? Even the gallant, gay "Lothario, warm with the Tuscan grape, and high in blood," might pause, reflect, and say to himself, I will not for this end, and to her ruin, seek the weak Calista, to break the peace even of Horatio, though I love him not. I will not be the villian's spider of society to watch where weakness strays, and to weave meshes on the way, that innocence may be entrapped. I will not be the reptile that, unpitying, sees the agony which follows from the agony or his snares. But the character of the charge against the defendant, the practice of other courts, and the evils which might result from a different course, all concur, and would alike forbid our granting a new trial upon the ground of excessive damages.

Yet the motion must prevail upon both the other grounds. The rule is well established, that though the wife's aberration, after her seduction by the defendant, or after her elopement with him, cannot be given in evidence, yet it is also clear that her conduct until actual seduction by the defendant may be

proven: Peake, 331; Phillips, 139. Now, in this case there was an interval of time, which, though very suspicious, was equivocal, *i. e.*, from the day of leaving her husband in July, to her certain cohabitation with the defendant in August following. It is true she had eloped, but with whom does not appear with certainty. The defendant had exposed his designs, and had kissed her; and though I do suspect that it did not, in this instance, require the deceitful kiss to consummate their treachery, but that the husband had been before betrayed. Still further inquiry was necessary; and the defendant had a right to the evidence of her misconduct with others, while that with himself was suspected only: *Boynston v. Kellogg*, 3 Mass. 189 [3 Am. Dec. 122]. Phillips, 64; Peake, 331. And if finally it should have turned out that his own criminal intercourse with her had in fact preceded such misconduct with other men, the evidence could and would have weighed nothing.

The second ground is equally clear. The object was to prove the wife's meretricious conduct before seduction by the defendant. And, provided the witness did not himself object to divulging his own immorality, it was not competent for any other person to do so. It would evidently be the best possible testimony, however degrading to him, who would voluntarily publish the fact. For he who answers against his own interest is, on that account, the more credible: Peake, 160. And however indecent, too, the exposure might be, yet, the law makes no distinction of that nature: Swift, 77, 80, 81. And though we may not protect a seducer of women, with all the feelings of men whose dearest rights are at stake, yet, the meanest claim the equal distribution of rights. Here no partial spirit, like assuming primogeniture, interferes to place one brother above another; but the eldest and the youngest, the greatest and the weakest child of the republic, take in equal partition the common heritage of the laws.

COLCOCK, NOTT, JOHNSON, and HUGER, JJ., concurred.

## JOHNSON v. BRAILSFORD.

[2 HOFF &amp; McCORD, 373.]

**REVOCATION OF WILL BY "BURNING," ETC.**—The degree of "burning, cancelling, tearing or obliterating," necessary to constitute a revocation of a will, under the statute of frauds, depends on circumstances; the slightest "burning," etc., will be sufficient, if shown to have been done *animo revocandi*; and the fact that the statute uses the word "destroying," instead of "burning, cancelling or tearing," does not change the case. Accordingly, if it is shown that the testator interlined and erased portions of the will and tore off the seals, with the intention to revoke it, the revocation will be complete; and the fact that he intended at the time to make another will, but failed to do so, will not revive the former will.

**APPEAL** from a decree of the ordinary of Charleston district, establishing a certain document as the last will of William Johnson, deceased. In the circuit court, on a feigned issue, the jury found a special verdict to the effect, that on October 25, 1808, the deceased duly made the will in question, setting it out in *ipsissimis verbis*, but that afterwards he tore off the seals, after crossing them with a pencil, and made sundry interlineations and erasures in the body of the will, and indorsed thereon a memorandum as follows: "I think my will at this time unequal; with God's permission I mean to alter it, and have all sold but the house and servants, etc., to Mrs. Johnson;" that at the time of tearing off the seal and making these interlineations and erasures the testator directed another will to be drawn out, which was done, but that the new will was never executed; and that in the opinion of the jury the seals on the original will were torn off, and the interlineations and erasures were made, and the said memorandum indorsed thereon, with the intention, on the part of the testator, to revoke the said will; and the jury submitted the question to the court whether these facts amounted in law to a revocation.

By Court, HUGER, J. 1. In support of the will it is contended that there can be no revocation of a will executed according to the statute of frauds, by the tearing and obliterating the seal; and, 2. That supposing the destruction of the seal of the will may, in the abstract, amount to the revocation of it, yet that the revocation in this case was not an absolute, self-subsisting revocation, but depended upon the substitution of another will, which having failed, the revocation is incomplete; and the will, therefore, must be valid. I shall consider these grounds in their order.

The statute of frauds, which has been made of force in this state, declares that all "devises and bequests, duly made and executed, shall continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions," etc.

The degree of burning, tearing, canceling, or obliterating necessary to the revocation of a will is not fixed by the statute. This must depend upon the circumstances of the case. If a will be thrown into the fire and is consumed, or if it be torn into many pieces by the testator, the violent presumption would be, that the instrument was burnt or torn *animo revocandi*, and it would require strong evidence to rebut this presumption; but if a will be only slightly burnt or slightly torn, there would arise no presumption from the act itself of the intention, or the *quo animo* which it had been done, and the will would not be revoked; but if the slightest burning or the slightest tearing be accompanied with satisfactory evidence, drawn *aliunde*, of the intention to revoke, the statute will be satisfied and the instrument be revoked: *Burtenshaw v. Gilbert*, 1 Cowp. 59; 4 Cruise, tit. Dev. 93; Pow. on Devises, 634.

In this case, the jury have found that the will was tore *animo revocandi*. It cannot be important what part of the will be torn. The seal, though unnecessary to the will, was made a part of it by the testator. The first two or three lines are equally unnecessary, and yet it would not be contended, if these lines had been torn from the instrument *animo revocandi*, the statute would not be satisfied. Although the words of our act of 1789, P. L. 491, 2 Brev. 35, are not precisely those used in the statute of frauds, they are so much alike as to make it almost unnecessary to notice them. The act of 1789 uses the word destroying, instead of burning, canceling and tearing; the former appears to include them all; a will burnt, canceled, or torn *animo revocandi* is destroyed.

On the second ground, it is contended that the will was not absolutely revoked; that the seals were torn off, the paper crossed, and interlineations made, with the intention of making another will; and that as another will was not made, the tearing of the seals, and the crossing of the paper, and the interlineations, are nugatory. But this is contradicted by the verdict. The jury expressly find that the seals were torn off with an intention to revoke the said will, and not to alter the said will, or with an intention to make another will, as contended. A number of facts are stated in the verdict; the crossing, the

interlineations, the directions for another will, that the will was found in a private desk, and so on, from which the jury deduced the conclusion that the seals were torn off with an intention to revoke. The testator appears to have preferred another will to intestacy, but it does not appear that he preferred the will in question to intestacy. The will directed but not executed, was materially different; probably as variant from the one in question as that which the law would have supplied; nor does it appear that the seals were torn from the instrument at the time a new will was directed to be drawn; it may have been long after, when even the disposition to make another may have subsided. In the case of *Onions v. Tyrer*, 1 P. Wms. 343, which is the leading case in this point, there existed no doubt as to the intention of the testator. He had executed his will to pass lands; by a second will, he expressly revoked the first, and likewise ordered it to be torn, which was done. The second will was attested by three witnesses, but they did not subscribe in presence of the testator. The statute of frauds is variant in its provisions respecting the making and revoking of a devise.

The fourth clause, as to making a devise, requires attestation in the presence of the testator by three witnesses. The fifth clause, as to revoking by will, requires attestation simply by three witnesses. The second will in the case cited conveyed the land to the same uses with the first, and only the trustees were changed; as the second will had not been attested by three witnesses in the presence of the testator, it was invalid as to land; but as the first will was only revoked for the express purpose of substituting the second, it was decided, as the second was not valid for the purpose intended, the first was not revoked. The revocation and substitution were one entire act; they constituted a single declaration of the mind; which could not be garbled without violating a common rule of evidence; but in this case the directions of a draft of a new will were not only materially variant from the old will, but were not contemporaneous with the crossing or with the tearing of the seals; the crossing, tearing of the seals, and directions for a new will, were not included in one entire act of the mind; they were not parts of one declaration, and therefore make a very different case from that of *Onions v. Tyrer*; and even in this case relief was afforded by the lord chancellor, on the ground of accident. The recent case of *Pringle v. McPherson*, 2 Des. 524 [3 Am. Dec. 713], is still more distinguishable from this case. There the testator exhibited no disposition to make

another will; he appears to have thought that he could by interlineations, subsequent to execution, alter & devise in his will; the alterations attempted were small; the will was neither burnt, canceled, torn nor obliterated; the statutory symbols were not only wanting, but the *animus revocandi* did not exist. Upon the whole, I am satisfied that the revocation was unconditional, and that the decree of the ordinary ought to be reversed.

COLLOCK, NOTT, and JOHNSON, JJ., concurred.

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### STATE v. HEYWARD.

[2 NOTT & McCOMB, 312.]

**CONSTRUCTIVE PRESENCE IN CRIMINAL OFFENSE.**—Where a person is proved to have been associated with a number of others for the commission of a crime, although he is absent when it is committed, he is to be deemed constructively present, and is therefore guilty.

**INDICTMENT** for a highway robbery committed on one John Peoples. It was proved that on the day of the alleged robbery the defendant, Heyward, with a number of other persons, armed with guns and sticks, set upon and severely beat the said John Peoples, as he was traveling along the highway near the Six-mile House, an inn kept by the defendant; that the assailants then left him, and after he had climbed into his wagon and traveled about two hundred yards further, two of the party returned and dragged him out of his wagon, and robbed him of certain bank bills. The evidence was positive that Heyward was one of the persons who committed the original assault, and Peoples also swore that he was one of the two who returned and robbed him, and that the other was a man named Fisher. There was evidence, however, on the part of the defense tending to show that Peoples was mistaken in this part of his testimony, and that it was not Heyward, but another of the party, named Laird, who returned with Fisher and committed the robbery. The presiding judge instructed the jury, among other things, that "if they believed the prisoner to be one of a gang who had associated themselves together for the purpose of committing crimes generally, or in or near the Six-mile House, that they had a right to presume him to be constructively present on the particular occasion set forth in the indictment."



By Court, GANTT, J. The court are of opinion that there is no cause for arresting judgment in this case. That can only be done upon objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous. No misdirection on the part of the presiding judge; no defect in evidence, or any other circumstance attending the trial, *dehors* the record, is a ground for arresting judgment: Chit. Crim. Law, tit. Arrest of Judgment.

The present motion, therefore, can be considered as one for a new trial only, for the several reasons taken in the brief; and first, is the prisoner entitled to a new trial for the supposed misdirection in the charge of the presiding judge? The correctness and propriety of the charge must be judged of by the nature of the offense contained in the indictment, and the manner of setting it forth; the evidence in support of it, and with reference to the arguments of counsel. In this indictment, sundry persons are included; various counts inserted, under which the persons implicated are respectively charged, first, as principals committing the robbery in person; and secondly, as aiders and abettors, or principals in the second degree. After that manner is Heyward the prisoner charged. From the evidence, no possible doubt can be entertained but that a most unlawful, unprovoked, wanton and violent assault has been made on the prosecutor, Peoples, by various persons coming out of the yard and Six-mile House, of whom Heyward, the prisoner, is positively sworn to have been one. The assault committed on a peaceable, unoffending stranger on the highway, traveling home from a market, in whose behalf the arm of protection ought rather to have been raised by the proprietor of the house than extended to his annoyance. The evidence shows that immediately consequent upon the outrages offered at the well, and when the prosecutor, Peoples, had proceeded at most but two hundred yards from the place where he had been so shamefully abused, he was followed, forced to stop, and robbed.

These are strong circumstances, and if not leading to the direct conclusion, certainly bear along with them the probability, at least, of a combination having been formed on the part of the assailants to act in concert upon some unlawful enterprise, and that they were encouraged to carry it on from the strength of their number, and the certainty of mutual assistance. It was so considered by the attorney-general, who made it a strong ground of argument, contending that the circumstance

of the assault at the well, and what immediately afterwards took place, would justify the jury in concluding that Heyward, the prisoner, was a principal in the second degree in this robbery, although he might not have been actually present when it was committed. These were the considerations which led the presiding judge in his charge to draw the attention of the jury to the doctrine of constructive presence, if they should have reason to distrust or discredit the positive testimony which went to establish beyond doubt (if accredited) the personal agency of Heyward in the robbery.

The law read by the presiding judge, and from which his comments were made, was the following from McNally: "In some cases there may be legal evidence of robbery, when in truth the defendant never had any of the loser's goods in his possession, as when I am robbed by several of one gang, and one of them only takes my money, in which case in judgment at law, every one of the company shall be said to take it, in respect of that encouragement which they gave to one another through the hopes of mutual assistance in the enterprise, nay, though they miss of the first intended prize, and one of them ride from the rest and rob a third person in the highway, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing:" McNally Ev. 596. Now, if the evidence in this case would justify the inference that the assault at the well was but the prelude of an intended robbery, and there is great difficulty in putting any other interpretation upon it, then it is impossible to conceive law more immediately applicable to the case. Whether the intent to commit robbery existed at the time of the assault by those engaged in it or not, the act committed was nevertheless unlawful, tending to excite a just sense of danger on the part of Peoples, the prosecutor, and certainly paved the way to the more ready accomplishment of what immediately afterwards took place, the robbery. Now, as to the abstract principle contained in the brief, can there be a doubt that if an association should be formed by a gang of men with the avowed design and understanding among them to commit robberies generally, and they should assemble at a particular place to carry on their trade and occupation the more conveniently, and especially on the side of the highway, that so long as this agreement continues, so long as they prosecute their design, they would respectively become principals in every act of robbery which each might, in the neighborhood of their range,

whether present or not? The contrary doctrine would lead to the most mischievous consequences; the law would identify them as one and the same in respect to robberies committed, and this from the countenance and encouragement which each affords the rest, the mutual assistance which they are ready to afford in every enterprise in which any of them may be engaged for the common benefit in pursuance of their common interests.

In 1 Chitty Crim. Law, 257, the law is thus laid down: "The presence need not be an actual standing within sight or hearing of the fact; but an active co-operation in the crime at the time of its commission; as where one stands to keep watch at a convenient distance while another completes the felony. So, if several persons come to a house with intent to make an affray, and one be killed, while the rest are engaged in riotous and illegal proceedings, though they are dispersed in different rooms, all will be principals in the murder." Here it is to be observed that no intent to commit murder existed on coming to the house; the intent was to make an affray, and this intent was common. One of the gang, however, commits murder, the rest, although absent in other rooms, prosecuting the object of their visit, not actually assistant in the murder, and not knowing that it was intended by the perpetrators, still they are considered as principals in the offense. The reason is, that they were engaged in the doing of an act which was unlawful, committing an affray, and shall be held equally answerable for all the consequences to which it may lead. Terror is inspired when numbers assemble themselves together for an unlawful purpose. Each actor is emboldened to greater lengths by the countenance which the rest affords, and resistance is weakened, if not done away with altogether, by the certain danger arising from opposition.

There is nothing which the law more abhors than illegal force and violence, and its just reprehension makes the authors answerable in particular cases for more than they may have actually intended to commit, but which has been the consequence of an incipient illegal act. Chitty is supported in his position by 1 Hale, 439; Haw. b. 2, c. 29, s. 8; 1 East, P. C. 258. Dalton, who is also referred to, by Chitty, deduces a correctness in this doctrine from what is said in 2 Sam. 12, 9, where David is told (from God) that he had killed Uriah, whereas he only commanded Joab to kill him; and in the case of the serpent who was aiding and advising the perpetration of the first sin, and

who, by the judgment of the Almighty, had imposed upon him a greater punishment than on the woman or man. The case of the Lord Dacre, noticed in 1 Hale, 439, although a case of murder, shows that the consequences, growing out of an unlawful act, devolve upon all who have been engaged in it. In that case the intent was to steal deer in the park of one Pelham, Rayden killing the keeper in the park. The Lord Dacre, and the rest of the company, being in other parts of the park, it was ruled that it was murder in them all, and they died for it.

In the case before the court, although there was no express evidence of any association having been formed by the persons engaged in the affray at the well, and therefore, by a remote possibility, the principle said to have been advanced, may have an influence in the finding of the jury. Yet it is thought much more probable that if the jury were influenced by anything short of the positive testimony of the prisoner being the robber, it must have been a conviction resting on their minds, and growing out of the circumstances of the case, that the robbery was the result of a preconcerted determination to commit it. The evidence affording this conviction being the violence of the assault at the well, a violence calculated, and perhaps intended, to impress upon the mind of the unhappy victim of it so strong a sense of their barbarity and his own danger, as to induce him afterwards to yield his property without resistance, rather than forfeit his life by a refusal. The time when the robbery was committed and the place where, are no inconsiderable circumstances to strengthen the conclusion that the last act was no more than the consummation of what had been before determined on.

An argument has been offered to show that, as the place where the robbery was committed was off the highway, that the prisoner is entitled to his clergy. But the court cannot view the circumstance in that light. It was a way used in common by travelers to avoid the sand, and must therefore be considered as much a highway as the road which he left, so long as there was no restriction to the enjoyment of this privilege; a practice not confined to that particular place, but one which extends throughout most of the low country, where the roads are deep with sand.

The evidence being positive as to the prisoner's being one of the persons who committed the robbery, it appears from short notes taken by the judge, of his charge, that the jury were told that the question was one of identity of person, in the solution

of which they were to be governed by the evidence which had been offered.

From the most attentive view of the evidence and circumstances incident to this trial, the court are of opinion that no new trial can be granted, and that the motions for the same must fail.

NOTT, JOHNSON, HUGER, and BAY, JJ., concurred.

RICHARDSON, J. I dissent in this case from the opinion of the court, upon the alleged ground of mistake in law, in the charge of the judge to the jury.

COLLOCK, J., was absent.

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### BAILEY v. IRBY.

[2 NOTT & MCCOMB, 242.]

**ADVERSE POSSESSION UNDER STATUTE OF LIMITATIONS.**—The possession that will give a title under the statute of limitations, must be an actual occupancy, definite, positive and notorious. Hence, the occasional cutting of timber, and the exercise of other acts of ownership, such as men are accustomed to use over woodland, is not such a possession.

**Action of trespass to try title to land.** The plaintiffs claimed as heirs at law of William Riley, who died in 1795, and who was the heir of William Riley, senior, to whom the land was granted in 1771. The defendants claimed part of the land by mesne conveyances under a grant to Thomas Word, in 1785, and a part under a grant to Robert Hutchinson, in 1786, and relied upon the statute of limitations. On account of the continuous disability of the plaintiffs from infancy since 1795, the case turned on the possession of the defendants prior to that time. The defendants proved possession for more than five years as to the part claimed under Thomas Word. As to the part claimed under Hutchinson, it was proved that Hutchinson's grant extended beyond the lines of the grant to William Riley, senior; that Hutchinson settled on that part of his grant outside the plaintiffs' lines, more than five years before 1795, and inclosed and cultivated a small field very near the line; that he was accustomed to cut timber, from time to time, as he had occasion for it, upon his grant within the plaintiffs' lines, from the time of his first settlement, and exercised such acts of ownership over the land as men usually exercise over woodland, but that he never erected any building, or made any inclosure, or clear-

ing, inside the plaintiffs' lines. The jury found a verdict for the defendants, whereupon the plaintiffs moved for a new trial on the ground that there was no proof of sufficient possession of the land in dispute, claimed under Hutchinson, to draw the title to the defendants, under the statute.

*O'Neal*, for the motion.

*McDuffie*, *contra*.

By Court, JOHNSON, J. This cause was tried before myself, and I distinctly stated to the jury that the facts proven in relation to the land granted to Hutchinson, did not, in my opinion, constitute such a possession as divested the plaintiffs of the title, and upon the best reflection I am yet satisfied with that opinion. The plaintiffs having, as to that part of the land granted to Word, acquiesced in the verdict, the only question is, whether the occasional cutting of timber and the exercise of such other acts of ownership over it as men are accustomed to do over wood-land, is such a possession as will divest the owner of the right to the soil under the statute of limitations?

It is necessary to the consideration of this question to examine minutely all the provisions of the statute. It is sufficient to remark that a possession of five years is a bar to the plaintiff's rights to recover, and what shall constitute the evidence of that possession is the only question. In the case of *Jackson v. Schoonmaker*, 2 John. 230, the court held that it should consist in "a real and substantial inclosure, an actual occupancy, a *pedis possessio*, definite, positive, and notorious." The good sense of these positions is, I think, apparent; they furnish on the one hand evidence of the honesty of the possession, and on the other they are calculated to apprise the plaintiff, unless he shuts his eyes upon it, that he who has such a possession, disregards his right or claims in hostility to him, and enables him to sue. But not so with him who enters only occasionally; he commits a petty trespass and disappears without scarcely leaving a mark behind; and if discovered at all, the owner is rather content to submit to it than seek redress through the means of a protracted and expensive law suit; or it may be done so secretly as to elude detection; and it would be monstrous to allow one man to filch away the land of his neighbor without the possibility of guarding himself against it.

But it is sought to take this case without these rules, by extending the defendant's possession without the plaintiff's lines, to the extent of his grant, on the doctrine that a pos-

session of a part is the possession of the whole. This argument is answered already, and all the objections which apply to the first position, apply to this with increased force; until a trespass has been committed, the plaintiff could not maintain his action, and this would be divesting him without the possibility of his guarding against it. I am therefore of opinion that a repetition of casual trespasses *ad infinitum* are but trespasses still, and is not such a possession as would bar the plaintiffs' right to recover; and I am inclined to think for the same reasons that this rule ought to prevail, whether the lands could be usefully occupied or possessed in any other way or not, as the same objections would equally apply.

This rule has a direct application to the facts in this case, and a new trial ought to be granted.

COLOOCK, RICHARDSON, HUGER, NOTT, and GANTT, JJ. concurred.

In *Lawrence v. Fulton*, 19 Cal. 690, this case was relied on, showing the signification of "occupation." The court saying: "The word 'occupation' may be so used in connection with other expressions, or under peculiar facts of a case, as to signify a residence. But ordinarily, the expressions, 'occupation,' '*possessio pedis*,' 'subjection to the will and control' are employed as synonymous terms, and as signifying actual possession." So in Illinois the principal case is cited to this point: *Goewey v. Urig*, 18 Ill. 241.

In *Bieda v. Benson*, 9 Rich., the authority of the principal case was recognized as sound on the doctrine of adverse possession, under which a title can be claimed: See *Hammond v. Ridgely*, 9 Am. Dec. 522; *Hall v. Powell*, 8 Id. 722.

## HARRISON v. MAXWELL.

[2 NOTT & McCORD, 347.]

**MERITORIAL OF WRIT IN SHERIFF'S DEED.**—In a sheriff's deed a recital of the authority, under which the sale was made, is not indispensably necessary; and if in such deed the execution is misrecited, as having issued from one court where it is in fact issued from another, the misrecital is not fatal.

**SALE OF VESTED REMAINDER ON EXECUTION.**—A vested remainder may be levied on and sold during the continuance of a preceding life-estate, and while the tenant for life is in possession.

**ACTION of trespass to try title to land.** The plaintiffs claimed, through mesne conveyances from one McDowell, who purchased the land at sheriff's sale, the sheriff's deed reciting that the sale was made on a writ of *fi. fa.* against the defendant in this action, issued upon a judgment of the court of common pleas of Abbeville district. At the trial the plaintiffs admitted that this recital was erroneous, and offered in evidence a judg-

ment and execution of the court of common pleas, of Laurens district, to support the sheriff's deed, to which the defendant objected, but the court overruled the objection. The defendant also claimed that his interest in the premises at the time of the sale was not subject to levy and sale on execution, and proved that his estate therein was derived from one John Maxwell, who devised the land to his (testator's) wife for life, with remainder to the defendant in fee, and that the tenant for life was living and in possession of the premises at the time of the sale.

The presiding judge, Johnson, J., being of opinion that the defendant's interest was subject to levy and sale, instructed the jury to find a verdict for the plaintiffs, which they did. The defendant moved for a nonsuit, on the ground of variance between the sheriff's deed and the judgment and execution, and for a new trial on the ground of misdirection.

*McDuffie*, for the motion.

*Noble, contra.*

By Court, JOHNSON, J. So far as I am informed, it has been the invariable usage to incorporate in the sheriff's deed a recital of the authority under which he sold; and I am satisfied that a strict adherence to that usage would be productive of no mischief, but on the contrary, of great convenience as well to the sheriff as to the purchaser. It would point the former to his authority to sell if he was called on to answer, and would facilitate the latter in deriving his title. But I am persuaded that it was not indispensable. The bare recital in a deed is not a substantial and efficient part of it, nor is it evidence of the facts recited, except between the immediate parties to it: *Phillipps on Evidence*, 356. The only object for which they are introduced is to furnish a clue by which, at a remote period, those interested may with facility ascertain from what sources their title is derived. *Preston, in his Treatise on Conveyancing*, 177, remarks, that the deed or will from whom the title was derived ought, in most cases, to be recited, or at least there should be a reference to them, and all such other facts should be disclosed as would show the right. This, he says, will greatly aid the title at a future period. It will lead to the documents on which the title is grounded; or should they be lost or destroyed, will tend to satisfy future purchasers that the title is correctly deduced. This, he adds however, can be done with prudence in those instances only in which the title rests on clear grounds and is not involved in difficulty; for on the one hand, no con-



veyancer of integrity will state that as a fact which does not exist. And on the other, it is his duty to keep his client's title free from a disclosure which, at a future period, might involve the title in increased difficulty, or raise a suspicion of its validity. The same doctrine will also be found in Hobart, 160; 4 Cruise Dig. 257.

It would appear from these authorities that a recital in a deed might or might not be made at discretion; and consequently, a misrecital of that which is legally immaterial is unimportant. It is not the recital of a power or authority to sell and convey which gives the right, nor is it evidence of the right; it is sufficient that the right did exist, and that the seller acted upon it. As a general rule, therefore, it is not necessary, and I am unable to see any distinction as applicable to sheriff's deeds, although I readily admit its usefulness. The levy and sale invests him with the title so far as to enable him to convey, and he does convey; and it is incumbent on the party claiming under him to show these powers; the recital will not do it. An argument *ab inconvenienti* opposed to this position is drawn from the difficulty that would arise in tracing a title, without this recital, at a distant period. But that sufficiently also exists in every conveyance which does not recite the whole chain of title, and the purchaser may avoid it by memoranda of his own, which will answer all the purposes of a recital in a deed.

On the other question in this case, I think there is no difficulty. The act of the legislature of 1759, P. L. 250; 2 Brev. 1, subjects houses, lands, and other hereditaments and real estates, to be taken in execution in payment of debts. These terms cover, I believe, every vested interest that a man can have in lands, and that they do the fee, will not be disputed. The fee-simple of the lands in dispute vested in the defendant under the devise, on the death of the testator, notwithstanding the life or other estate carved out for the widow, and was therefore the legitimate subject of levy and sale: See 2 Bac. 699, tit. Execution, b. 2; Roll. Abr. 478; 2 Dall. 223. It is argued, however, that an entry by the sheriff for the purpose of levying during the existence of the life-estate, would be a trespass on the rights of the tenant for life. This difficulty may, I think, be obviated, even if an entry be necessary, which I am disposed to question. If the law authorizes an entry, it must of necessity afford a protection for that purpose, so far as is necessary.

On both the grounds, therefore, I am of opinion the motion ought to be dismissed.

COLOOCK, RICHARDSON, and HUGER, JJ., concurred.

## OSBORNE v. BRENNAN.

2 NOTT &amp; MCCORD, 437.]

**WHAT CONSTITUTES A PARTNER.**—To charge a person as a partner it must appear, either that he has permitted the use of his name as one of the firm, to give it credit, or that he has shared in the profit or loss.

**ACTION** against the defendant as dormant partner of the firm of Brennan & Stone. The case was originally brought before the inferior city court of the city of Charleston, and the evidence, as reported by the recorder, consisted, in substance, of two letters written by the defendant to his alleged partner, Stone, showing the consignment of certain articles to Stone, with some directions as to their disposition, and of a deposition by one Murray to the effect that Stone kept a store in Beaufort, and was supplied with goods by the defendant, and that he, Murray, was present when an agreement was made between the defendant and Stone respecting the articles consigned. The recorder thought the evidence insufficient to make the defendant liable as a partner, and that he should have a verdict, but the jury found for the plaintiff, whereupon the defendant moved for a new trial.

*Lance*, for the motion.

*Dunkin*, *contra*.

By Court, JOHNSON, J. To charge a defendant as a partner one of two things is necessary, either he must have permitted his name to be used as one of the firm, thereby holding it out as a security to the community, or he must have participated in the profit or loss.

The first of these is directly contradicted by the evidence of the plaintiff. The goods are charged to Stone alone in the plaintiff's books, and it follows, must have been delivered on his credit.

If the defendant be liable then it is in respect of his participation in the profit and loss of the house, at Beaufort, and of this there is not the least proof. If the bare fact of supplying a house with goods be sufficient evidence of a copartnership, the whole commercial world would constitute but one family and one firm. However grand in theory this state of things might appear, it would be found too unwieldy for practical uses.

The evidence in this case furnish no other fact from which the existence of a partnership can possibly be inferred. It fol-

lows, therefore, the verdict is wholly without evidence; and a new trial ought, I think, to be granted.

NOTT, BAY, RICHARDSON, and HUGER, JJ., concurred.

See *Dob v. Halsey*, and note, 8 Am. Dec. 233.

## EDWARDS v. MOSES.

[2 NOTT & McCOMB, 422.]

**DRAWER ENTITLED TO NOTICE, WHEN.**—The drawer of a bill of exchange is entitled to have payment demanded of the drawer and notice of non-payment given to himself, unless there is a total absence of effects in the drawer's hands from the date till the time of payment. Accordingly, if the drawer has funds in the drawee's hands at the date of the bill, but draws them out before it becomes due, unless it appears to have been done for the purpose of defeating the bill, or unless he knew that the funds were exhausted, demand and notice are not dispensed with.

**ACTION** by the holder against the drawer of a bill of exchange. The case was commenced in the inferior city court of Charleston, and the facts as reported by the recorder were that the check was drawn by the defendant and his partner, Brown, now insolvent, on the Planters' and Mechanics' Bank, in favor of the plaintiffs, and that between the date of the check and the time when it should have been paid, the defendant and his said partner drew all their funds out of the bank on another check, in favor of one J. C. Moses; so that there remained no money to pay the check held by the plaintiffs. It was stated, but not proved, that the plaintiffs duly presented their check for payment. The defendant moved for a nonsuit, which was overruled, and a verdict found for the plaintiffs. The defendant now moves this court for a nonsuit: 1. That there was no proof to show that there were not funds in the bank when the check became payable; 2. That admitting there were no funds, there was no proof of demand on the drawers; 3. That there was no proof that the defendant knew that there were no funds in the bank.

*Axon*, for the motion.

*Bentham & Parker*, contra.

By Court, RICHARDSON, J. It does not expressly appear whether there were funds of the drawers in the bank at the date of the check, though it seems implied that they were afterwards drawn out by another check, the date of which doth not appear.

It is now well settled, that if the drawer has no effects in the hands of the drawee, from the date to the time of payment, demand and notice are dispensed with: 1 T. R. 405; 2 Id. 713; Swift, 290. But this exception requires that there should be a total absence of all effects during all that time: 2 Camp. 503; 12 East, 174. And I apprehend it should appear that the drawer knew that there would be no effects, 2 T. R. 713, and that when the effects were failed by accident, and did not reach the drawee, demand and notice are not dispensed with.

By the decisions of this court in the case of *Sutcliffe & Bird*, v. *McDowell*, and in *Lilley v. Miller*, demand and notice are also dispensed with, where the drawer purposely withdraws his effects in order to defeat his own bill; and where he forbids the drawee to pay, as in the latter of those cases. But the case before us comes within neither of these exceptions. It is the common case of an overdrawing, which if permitted to form another exception, would fritter away the established rule requiring notice generally; and would very frequently introduce very complex collateral issues. As whether any and what balance was in the hands of the drawee, or whether the drawee favored one bill more than another, and the like. Such consequences growing out of the case of *Sutcliffe & Bird v. McDowell*, would be unfortunate.

In the cases before us, it is certain only that the check given to I. C. Moses swept the balance of money in the bank belonging to the drawers. But does it appear that I. C. Moses was not a real creditor, or that the money was purposely withdrawn by the defendant to defeat the plaintiff's check? By no means.

The general rule then applies in all its force; demand should have been made, and notice given.

The motion is therefore granted.

BAR, NOTT, and JOHNSON, JJ., concurred.

See *Robinson v. Ames*, 20 Johns. 146; S. C., 11 Am. Dec.

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## GIST v. COLE.

[2 NOTT & MCCORD, 488.]

**REPLEVIN FOR GOODS SEIZED.**—Replevin will not lie for goods seized upon a warrant issued by an officer under the patrol law.

**MOTION** to set aside a writ of replevin. The facts were: Gist, the plaintiff in replevin, had been fined by Cole, the defendant,

who was an officer in the militia, in the sum of seventy dollars, for non-performance of patrol duty; and under the provisions of the patrol law, the defendant issued his warrant of execution commanding the seizure of sufficient of the plaintiff's goods to make the amount of the fine. Under this warrant, a negro belonging to the plaintiff was levied upon, but before a sale could be made, the plaintiff took the negro out of the officer's possession, upon a writ of replevin; whereupon the defendant filed this motion, and obtained a rule to show cause why the same should not be granted. The presiding judge granted the motion, from which the plaintiff appealed.

*Lance*, for the motion, contended that replevin would not lie, except in cases of distress for rent in arrear, citing 3 Bl. Com. 146; *Shannon v. Shannon*, 1 Sch. & Lef. 324.

*Tbomer, contra*, claimed that the warrant in this case was like an execution issued from a court of inferior jurisdiction, and that therefore goods seized thereon could be replevied, citing 6 Bac. 56; and Gilbert on Replevin, 154.

By Court, BAY, J. To the arguments and authorities adduced on the trial below, I have since given a more attentive consideration; and without going again into the general doctrine of replevin, which I formerly, and on so many occasions since, as well as before, have given to it, I shall confine myself to the exceptions relied upon by the counsel against the motion.

The first exception taken was that the warrant in that case might be assimilated to that of the commissioners of sewers, when the king's bench, it is said, refused to give an order to quash the writ of replevin which had issued for the goods levied on in that case. I have examined the original report of the case referred to in 6 Bac. 56, and find that the warrant of distress issued by the commissioners of sewers was for the rates of an assessment on lands in the county of Gloucester, amounting to four pounds one shilling and six pence, for not repairing a sea-wall which they had caused to be repaired, and for which the adjoining land was chargeable, in which case it might well be considered as a rent-charge. Upon a motion in *Banco Regis* to quash the replevin which had issued for the goods taken by virtue of the warrant, it was doubted whether it should be set aside or not, as it might be considered as a rent-charge, in which case a distress would lie. And secondly, because it was urged that this assessment had not been made by the court of sewers, as authorized by act of parliament, but by some of the

individual commissioners out of court, by their own authority. The court, therefore, refused to make any order upon the subject until they had the whole case before them: *Pritchard v. Stephens*, 6 T. R. 522. What became of the case finally, the reporters do not inform us. It commenced in doubt, and remains in uncertainty as far as we are informed; so that in fact and in truth, it proves nothing. At all events, however, it appears to me to have no bearing on a case like the one before us. In that case the land was chargeable for the assessment, if it had been regularly made, and the distress was the appropriate remedy for non-payment, as much as for rent in arrear. Whereas, in the present case, the fines were for neglect of a personal duty, which Mr. Gist was bound to perform; so that, in my opinion, the cases are in no wise analogous to each other.

The second exception relied upon was, that this proceeding might be considered as one in an inferior court, in which case, it was contended, that replevin would lie for goods seized under its authority and jurisdiction. The counsel admitted that an attachment of contempt would lie for issuing a replevin for goods taken in execution, issuing out of a superior court, but not out of an inferior jurisdiction; and for this purpose cited 6 Bac. 56, who relies on Gilb. on Replevin, 154. If such a doctrine was once to prevail in South Carolina, and it was held to be the law, I have no hesitation in saying it would soon lay prostrate all the proceedings in all the inferior tribunals of justice in the state. No executions but those of a court of chancery and the court of common pleas would be secure against this sweeping writ of replevin; and that, too, at a time when the parties were upon the point of receiving the fruits of their judgments. All the executions out of the inferior city court, those issued by the different corporations for fines and forfeitures, commissioners of the high roads, and all the public bodies in the state, as well as those by magistrates, or by the officers of militia for fines, etc., would all be paralyzed by the abuse of this writ, upon the principles contended for; for it would only be for the party whose goods are seized under the authority of any of these jurisdictions to issue his replevin, and get these goods delivered back to him, and then the other party must get them back again the best way he could. At all events, the party thus baffled and disappointed must go into the court of common pleas and avow the taking, and show that all the proceedings were regular and agreeable to law; and even then the plaintiff in replevin would be entitled to his reply, and

every case, after the lengthy proceedings are made up and issue joined, must go on the docket of the common pleas, to be tried in regular order, and years would revolve about before these cases could finally be determined on. Thus, a scene of confusion and delay would ensue, of which few men can well see the end.

Fortunately, however, for the citizens of South Carolina, this is, in my opinion, not the law. I acknowledge that Gilbert has said so, and that Bacon has quoted him to that effect; but neither reason nor justice will bear him out in this position, for I lay it down to be sound law, as well as the wisest policy, to give every jurisdiction created for the advancement of justice, and the good order and police of the state, all the specified powers and authorities with which they were invested; and there is no more reason or justice for calling in question or interrupting their proceedings while they act within the rules prescribed to them, than there is for calling in question the proceedings of the superior tribunals of justice. If, however, any of them should, at any time, transcend or exceed their limits and powers, a prohibition from one of the superior courts is the appropriate remedy appointed by law for correcting or preventing any abuse.

It is argued in *Pangburn v. Partridge*, 7 Johns. 142 [5 Am. Dec. 250], that this position of Gilbert, "that replevin lies for goods taken in execution from an inferior court," is clearly erroneous, and that there are numerous cases to the contrary. In this opinion I perfectly coincide; as the whole current of authorities in the books upon the subject are against it. It will not be denied but that the supreme authority of parliament in Great Britain, and of the legislative body in South Carolina, have an unquestionable authority to control the common law; and even in acts of parliament themselves it is a maxim that *leges posteriores priores abrogant*. Admitting, then, for argument's sake, that such a principle as the one laid down in Gilbert ever existed as a part of the common law, there can be no doubt but a positive act of the legislature would turn the scale against it; and that the statute law from thenceforward would become the law of the land.

There are no positive and express decisions or authorities in this country in favor of the doctrine I am now advocating, because this principle of a replevin lying in these cases is a thing of yesterday; one of spurious growth, utterly unknown and unpracticed in our country, from its earliest institutions. But in England the cases are numerous, where it has been settled

that this writ of replevin will not lie in any case for goods taken in execution, under the authority of an act of parliament, or any inferior jurisdiction. In *Bradshaw's case*, T. 12 W. 3, mentioned in 6 Bac. 55, and also by Cunningham in his Law Dictionary, it is laid down that wherever an act of parliament orders or directs a distress and sale of goods, it is in nature of an execution, and replevin does not lie for them. So it is laid down in 6 Bac. 56, that replevin does not lie for goods seized by a warrant from a justice of the peace, upon a conviction for the destruction of game, under the authority of an act of parliament; and that it would be considered as a contempt to issue it. In the case of *Rex v. Oliver*, Bunb. 14, on a warrant of distress for a land tax, a replevin was considered a contempt. And so in like manner in the case of *The King v. Monkhouse*, it was determined that replevin would not lie for goods distrained on a conviction for deer-stealing, under an act of parliament: 2 Str. 1184; and that an attachment would go against the under-sheriff for serving it.

This brings me at last to the patrol law, which is a public act of South Carolina, under which the warrant for seizing the negro in question was issued, and who has been replevied. This act may and ought to be considered as one of the safeguards of the people of South Carolina, for the protection of their dwellings and habitations, and for the prevention of the unlawful assembling of a particular class of our population, and as a security against insurrection; a danger of such a nature that it never can or ought to be lost sight of in the southern states. It may justly be considered as a branch of our militia system; our grand national defense against foreign enemies, and for our internal tranquillity at home. It is easy, therefore, to see that summary and decisive powers ought to be vested in the hands of those who are charged with the execution of this important duty. The act in question, therefore, has given the necessary powers to the captains of the militia throughout the state, and has fixed and regulated the fines for all the neglects and omissions of duty by those who are by law liable to perform it, and has authorized them to issue their warrants under their hands and seals, to seize and levy upon the goods and chattels of defaulters, to pay and satisfy the fines imposed for this neglect of duty. Here, then, is a plain and positive act of our legislature giving these full and express powers to our captains of the militia; and under the authority of one of them, and by virtue of his warrant, the negro Stephen, belonging to Mr. Gist, was levied on, and in the lawful possession of the officer charged



with the execution of it, when this writ of replevin was issued; which brings this case immediately under the principles of the cases in which it has been determined in England, that a writ of replevin will not lie in opposition to an act of parliament. I am therefore clearly of opinion that the writ of replevin in this case was not warranted by law, and that it was an illegal interference with the proceedings and the authority given to one of our militia captains by the act of the legislature, and that the same should be quashed, or set aside as null and void; and further, that the negro Stephen should be delivered back to the military officer from whom he was taken by the sheriff of Charleston district, in order to raise the fines mentioned in Captain Cole's warrant.

COLOOCK, NOTT, RICHARDSON, JOHNSON, and HUGER, JJ., concurred.

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See note to *Kellogg v. Churchill*, 9 Am. Dec. 104, upon the subject of replevy of goods taken in execution. Mr. Sumner, in his often-cited article in 12 Am. Jur. 104, maintains that where an inferior court has jurisdiction, its process will protect goods taken under it from replevin as much as if it were a superior court. In *Lynah v. Commissioners*, Harp. 336, it was determined on the authority of the principal case that goods seized under an execution against their owner, issued by the commissioners of roads for a fine, are not repleviable, and the law is said to be well settled. And in *Hewitson v. Hunt*, 3 Rich. 106, where the case is also referred to as an authority, it was decided that replevin will lie in that state only in cases of wrongful distress.

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## HALL v. FREEMAN.

[2 NOTT & MCCORD, 479.]

**PROMISE BY INDORSER AFTER MATURITY.**—Where an indorser promises to pay a note with full knowledge that he has not received due notice of demand upon the maker, such demand will be presumed.

**ACTION** by the holder against the indorser of a promissory note. All the parties to the note lived near each other. A witness testified that at the request of the plaintiff he called on the defendant the day after the note became payable and demanded payment, and that the defendant then promised to pay it, and to give his own note for part of it, saying that he knew that the maker was insolvent. He also testified that afterwards, on the same day, he again called on the defendant, who said that he had ascertained that the note was payable the day before, but that he did not deal in catches, and presumed he should call and discharge it. There was no proof of demand on the maker, or that at the time of the first promise the defendant knew that

the note was overdue. The jury, under the direction of the court, found a verdict for the plaintiff, whereupon the defendant moved for a new trial on the ground that there was no evidence that he knew that demand had not been made on the maker at the time he made the subsequent promise.

By Court, HUGER, J. In *Hopley v. Dufresne*, 15 East, 275, a presentation was not only not proved but had not been legally made, and yet it was held, that in an action against the indorser on a subsequent promise to pay, it ought to be left to the jury to determine whether the defendant had notice at the time of his subsequent promise, that there had been no due presentation. And in *Lundie v. Robertson*, 7 East, 231, when the indorsee, three months after the bill was due, demanded payment of the indorser, who said he had not had regular notice, but would pay it, and no demand was proved to have been made upon the acceptor, though averred in the declaration, it was held, that everything ought to be presumed against the defendant in order to facilitate transactions of this nature; and it was presumed that the bill had been regularly presented, and due notice given to the indorser; and that the subsequent promise to pay was an admission that there existed no objection to the payment, and that everything had been rightly done.

In this case the insolvency of the drawer was known to the indorser, as he confessed upon the first application made to him for payment. Between the first and second application for payment he appears to have been investigating the circumstances of the case, for he said to the witness Montague, on his second application for payment, that he had ascertained that the note was payable the day before, but that he would pay the note. The presumption is that he knew, when he made this promise, all the circumstances of the case, and if there had been no demand made on the drawer he would have ascertained it. He was certainly aware that he was not legally bound to pay the note from the want of notice; but he said he did not deal in catches. His promise to pay was absolute, and the presumption is, that there was a previous demand on the drawer, and it need not be proved.

The motion is dismissed.

GANTT, and JOHNSON, JJ., concurred.

RICHARDSON, J., dissented.

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## WALL v. ROBSON.

[2 HOFF &amp; McCORM, 492.]

**WAR SUSPENDS STATUTE OF LIMITATIONS.**—The operation of the statute of limitations is suspended between the citizens of two countries at war, while such war continues.

ACTION commenced in the inferior city court of Charleston, on a bill of exchange, drawn March 2, 1812, in favor of the plaintiff, a British subject, upon the defendant, an American citizen, residing in Charleston, payable thirty days after sight, accepted by the defendant April 25, 1812, and protested for non-payment May 28, 1812. The action was commenced October 20, 1818. The defendant claimed that the action, not having been commenced within five years, was barred by the statute of limitations; and the question was, whether the operation of the statute was suspended during the war between the United States and Great Britain, which continued from June 18, 1812, to February 17, 1815. The recorder decided, upon a special verdict, that the statute did not run during the period of the war, and gave judgment for the plaintiff, from which the defendant appealed.

By Court, BAY, J. This case was very ably argued by the counsel on both sides, and a great number of authorities were produced upon the occasion. I have since considered the arguments, and reviewed the authorities adduced, and am most clearly of opinion, that the decision of the recorder was a correct and legal one. I shall briefly give my reasons for this opinion, and quote the principal authorities on which I rely in favor of it.

At the threshold of this case, it is important to consider the nature and object of our statute of limitations. It appears to me, that the grand object of our limitation act, and indeed the object of similar acts in all countries where they exist, was to prevent old, long standing, and antiquated demands, from being raked up and brought forward against men after such a lapse of time, as it was reasonable to suppose all transactions had been finally settled between the parties. By the common law, there was no limitations of actions of any kind. But in England, by degrees, divers acts of parliament were passed at different periods in the history of the country, for fixing and determining the time within which all actions, real and personal, were to be commenced or instituted. But one universal

principle seems to pervade or run through the whole of them, namely, to prevent ancient claims from being set up and prosecuted after the original parties and all their witnesses were dead or removed into remote parts, beyond the reach of the courts of justice, or that their deeds and vouchers were lost and mislaid by time or accident, and particularly in money transactions, where it was fair to presume, the debts had been paid or satisfied. It was for these reasons, and to quiet men in the enjoyment of their estates and possessions, that these restrictive acts have been enacted, and more especially that our limitation act was passed. But it never could have been intended to prevent a man who had never been guilty of any willful laches or delay, but who had been prevented by inevitable necessity, from pursuing his just rights.

Having taken this concise view of the origin of our limitation act, I shall next proceed to consider what these causes or events are, which prevent a man from pursuing his legal remedy, and which appear to me to form exceptions to the operation of these acts; and indeed of all municipal laws and regulations whatever. And these I take to be two: 1. The act of God; 2. Enemies in war.

The act of God, to which the destinies of man must submit, and over which human laws can have no control, then forms the first grand exception to the operation of all legislative acts, and is so broad and extensive in itself as to include within the range of its operation, all the storms, tempests, earthquakes, and other casualties of nature. Whenever they happen they form marked exceptions to all human institutions. If a master of a ship, who is bound by law to carry and deliver goods in safety, is overtaken by a storm or tempest at sea, is obliged to throw over a part of the cargo to save his own life, and the lives of others on board, this will exempt him from any responsibility for damages to the owner. So, if a common carrier, who is bound to carry goods safely at all events, is in like manner overtaken by a storm or tempest, whereby the goods are lost, it shall excuse him. So, if a house be destroyed by fire, in the course of a dreadful conflagration, occasioned by lightning, or by an earthquake, which a tenant is bound to keep in repair, and to deliver up in good order, this shall release him from his covenant. I only mention these few instances, as illustrations of the subject under consideration, and which I find confirmed by the best common law writers and authorities. In Plowden, which was quoted in the argument, this doctrine

is very fully laid down and illustrated. In page 9, he says: "In our law, as well as in all other laws, there are some things that happen which cannot be prevented by any foresight or possible diligence, or avoided by any means whatever; and when any such thing happens to a man, the law will not punish him for it; for the law will not punish a man but for his own default, and if the law sees no default in him, it will not punish him; for if the law should punish a man for accident, which by no foresight or diligence, could possibly be avoided, it would be utterly against reason, and therefore seeing that such accidents can by no means be avoided, the person upon whom they happen, shall not be hurt or injured thereby."

This very able and excellent commentator then goes on and adds: "There are three kinds of laws by which the people are governed, viz., the general law, customs and statute law, and in these three laws such unavoidable accidents shall not hurt any one;" for which reason, he says, "though the effusion of blood and killing a man is prohibited by the common law, yet every man may kill another in his own defense." "So, by the common customs of the realm, as hosts shall be charged for the goods of their guests lost or stolen, yet if their houses be broken by the king's enemies and the goods be taken from thence, they shall not be chargeable for them, by reason that such violence cannot be resisted, and so like reason will dispense with the statute law, and this from the necessity of the matter." Plowden then instances the case of a ship on fire, storms and tempests at sea, and throwing goods overboard to save the lives of passengers, and which I have before observed upon. All these instances, and many more which might be examined and enumerated, will excuse or prevent the ordinary operation both of the common and statute law, whenever they happen, and may be considered as forming exceptions out of the general principles of all laws, as Plowden very fully and justly observes. If I was to search volumes, I could find nothing more conclusive on the subject than the reasoning of this wise and able old common law commentator; and there is nothing in modern writers to contradict him, but on the contrary, they all bow down to and respect him.

Secondly, enemies in war. Under the foregoing head, I have considered the exceptions to the operations of municipal laws by the act of God. I now proceed to consider the second general exemption from the casualties of war.

Vattel says it down in lib. 3, chap. 1. sec. 1, p. 267, that

"war is that state in which a nation prosecutes its rights by force of arms." In sec. 4, p. 439, he lays it down that private individuals have no hand in the declaration. "A right so dangerous and important can only be intrusted to the supreme authority of the country alone." It is, therefore, one of those events or casualties which individuals cannot prevent, and over which they can have no more control than they can have over the elements we have just been considering. He then proceeds: "Formerly wars were carried on with great rigor, and everything found in the country belonging to an enemy or the subjects of an enemy, was confiscated to the state; even debts due from the subjects of a state at war to those opposed in war were confiscated also, but at present they are carried on with more moderation and indulgence, especially since the introduction of commerce among the European nations, and, consequently, all the sovereign nations of Europe have departed from this rigor; and as this custom has been generally received, he who should now act contrary to it would injure the public faith;" for, he adds, "strangers are his subjects only from the firm persuasion that this general custom would be observed. States do not so much as touch the sum which it owes the enemy. Everywhere, in case of wars, funds credited to the public are exempted from confiscation and seizure." Vattel, lib 3, chap. 5, sec. 76, 77, p. 298.

So far with regard to the law of nations. Corresponding with these principles of nations at law, Lord Coke lays it down as a part of the common law that there is a distinction between an alien friend and an alien enemy. That an alien enemy shall not maintain either real or personal actions until both nations are at peace; but an alien friend at peace may maintain personal actions; for an alien friend may trade and traffic, buy and sell, and therefore, of necessity, he must be of ability to have and support personal actions; but he cannot maintain real actions, as he cannot hold lands: Co. Lit. sec. 198, p. 129. Again when the courts of justice are open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is time of peace; but when by invasion, insurrection, rebellion, or the like, the peaceable course of justice is disturbed, or stopped up, so that the courts of justice are shut, "*ex silent leges inter arma*," then it is a time of war: Co. Lit. sec. 412, p. 249. So careful, therefore, is the law of the rights of men that if a man be disseised in time of peace, and the descent is cast in time of war, this shall not take away the right of entry of the disseisee: Co. Lit. 412.

From the foregoing principles laid down by Lord Coke, it appears that the common law recognizes the civil law, and they both coincide and harmonize upon this important subject, namely, that in time of war no action can be maintained by an alien enemy; but upon the return of peace all the friendly relations between the subjects and citizens of the two countries are restored, and their rights may be mutually prosecuted in the courts of justice in either country, respectively, without hindrance or interruption. And the reason given for not permitting an alien enemy in time of war is a good one, as it might have a tendency to draw the resources out of the country, and the better enable or aid the opposite party to carry on the war on his part. War then does not deprive the individual, in an enemy's country, of his right or demand; it only suspends it until the courts of justice are open to enable him to recover it. The privilege of commerce has secured this right to the subjects of all nations; and the state which should refuse this right at the present day would not deserve to be ranked among those of the civilized world.

Upon the return, therefore, of the day of peace all those rights recommence which had lain dormant, or had been suspended during the period of war. A contrary doctrine would enable every debtor in a country lately restored to peace, where there had been commercial dealings before the war, to cheat and defraud his just and *bona fide* creditors, as was very well observed in the argument, since every nation in its political capacity disdains or disclaims every idea of confiscating commercial debts to its own use. If, then, it is clear and evident both by the common law and the law of courtesy of nations, that there is no national principle existing to bar or prevent an alien in a foreign country from recovering a just debt after the restoration of peace, shall it be said or allowed that any municipal regulation of one of the states shall have that effect, where the general law of nations and those of foreign commerce say the contrary? I very much question the power or authority of any state or nation at this enlightened period of the world to pass such a law, if they were disposed to do such an act of injustice.

But it is said our statute of limitations will have that effect, which brings me to consider, thirdly, the nature and operation of that act. I have already given my ideas of the general nature and design of the statutes of limitations wherever they have prevailed. I shall now confine myself more particularly to our

limitation act of 1712, 2 Brev. Dig. 21. And here I would observe that I consider it as a mere municipal regulation, founded on local policy, which can have no force or bearing abroad, and with which foreign or independent governments have no concern. But it has been contended that when it once begins to run, it must run on, notwithstanding any subsequent disability, till it runs out, and this, too, as well against foreigners as our own citizens, and as well during war as in peace. I admit that it is, in general, a good rule, but to every general rule there are exceptions, arising from necessity or causes beyond the reach or control of municipal regulations.

The intent and meaning of the above general rule, when confined to its true and proper limits, I take to be this, as every general rule ought to be founded on right and reason, that where the laws of the country afford a redress for every injury, and recovery of every just right, and the courts of justice are open to administer redress, the party entitled to a remedy, or to a just demand, who will not pursue it within the times mentioned in the act, and use that diligence which the law requires of him for the recovery of it, in such cases, the statute once beginning to run shall run on until the party is barred of the right or remedy, and any other construction of the rule would, in my opinion, be subversive of every principle of justice. For it surely will never be contended that municipal regulations or local statutes can control the destinies of nations, or deprive the citizens of a belligerent of rights they were entitled to before the declaration of war.

Is it not more consistent with reason and justice that such rights should remain suspended till the storm of war shall end, and peace once more smile upon and bless contending nations? No rational mind can refuse its assent to the affirmative of this proposition. War, it is admitted on all sides, cuts off all friendly intercourse between the citizens and subjects of contending nations, and shuts up the courts of justice against the demands of each other, however numerous and great the credits or creditors may be. It is an event that the creditors could not control, and over which they had no power. There is no default in them. It is one of those things which Plowden says could not be avoided by foresight or diligence, and when such things happen, the law will not punish a man for it; for if the law should punish a man for an accident, or for an event, which by no foresight or diligence could be avoided, it would be utterly against reason. Now to apply these principles and the force of



this reasoning to the case immediately under consideration, the law of nations not only permits, but favors foreign commerce; and the courtesy of nations permits and allows contracts for merchandise, and as a natural consequence, the right of recovering debts.

For example, a man in South Carolina contracts a debt with a merchant in England, and imports his merchandise in good order, and in due time, agreeable to order. Within one month after this contract is made, war is declared between Great Britain and America (and lasts, we will suppose, for five years, the time mentioned in the act), at the end of these five years peace is restored, and the merchant in England calls upon his debtor in South Carolina for his money, no, says the debtor, we have a statute in force in South Carolina which says all debts not sued for within five years shall be forever barred; that this statute began to run when the contract for the goods was made, and it ran out, which operates as a bar to your recovery. But, replies the English merchant, I was prevented from bringing suit, as war was declared immediately after the contract was made, and I brought my action as soon as possible after the war ended and peace was restored. No matter for that, rejoins the Carolina debtor, our statute of limitations began to run from the day of the contract, and nothing could stop it till it ran out. So your debt is gone forever. Would this be justice? Would it not be punishing an innocent man for an event which he could not foresee, and which no diligence on his part could prevent? Would it not, lastly (as Plowden says), be utterly against reason? Most undoubtedly it would. What, then, I would ask, becomes the duty of the judges in such a dilemma? Are they to give this act such a construction as to enable the debtor to cheat his honest and *bona fide* creditor out of his money? I trust not. It therefore, in my opinion, becomes the duty of the judges of our courts of justice to give the act a reasonable and equitable construction, such as is consistent with reason and justice.

And to that end the best general rule in construing statutes is the one laid down by Plowden, 467, in which he says, in order to form a correct judgment, whether a case be within the equity and intent of the statute: "It is a good way to suppose the law-maker present, and that you asked him this question: Did you intend to comprehend this case within the statute? Then give yourself such an answer as you imagine he, being an upright and reasonable man, would have given. If this be,

that he did mean to comprehend the case within it, then you may safely give it such a construction. But if, on the contrary, that he did not think it within the equity and intent of the statute, then act in conformity to it." Plowden still goes on, and adds: "In some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged by it; and in others again it is even contrary to the letter of the statute," which shows the latitude the sages of the law have at different times taken in construing statutes, in order to make them equitable and reasonable. For fear it should be said I am straining this doctrine too far, I will quote another passage or two from Plowden, and I am sure I cannot rely upon a higher authority. "Experience shows," says this great and profound lawyer, "that no law makers can foresee all things which may happen, and therefore it is fit that if there be any defect in the law, it should be reformed by equity, which is no part of the law, but a moral virtue, which corrects the law," from whence he concludes, "that the reader may observe how convenient a thing this equity is; and the wise judges of our law deserve great credit and commendation for having made use of it, where the words of the law are rigorous; for thereby they have softened the severity of the text and made the law tolerable:" Plowd. 467. In 1 Inst. 360, it is laid down as a maxim that a statute should be so construed that no man who is innocent should be punished by it, or endamaged.

So in Carthew, 136, it is said that no statute shall be construed in such a manner as to be inconvenient or against reason. Now to apply these rules of construction to our statute of limitation (which, by the by, was passed more than a century ago, when the rights of commerce, as well as the law of nations, were not generally well understood in Carolina, and when it was a colony to Great Britain; and when it could not possibly have been supposed that this then colony should ever become an independent state, or that the merchants of Great Britain should ever be considered as aliens in this country); can any man, I say, bring himself to believe that the colonial legislature of South Carolina at that day, say 1712 (one hundred and eight years ago), could possibly have had it in contemplation to have regulated the nature of actions between foreign merchants and the citizens of South Carolina, as an independent state, or that they should have intended to fix and ascertain the time or period for bringing suits for the recovery of debts from each other? Utterly impossible! The idea is too romantic

to be indulged in for a single moment. But to go one step further, and the more immediately to apply Plowden's rule; suppose for a moment it were possible to call up the members of the legislature of 1712, from their slumbers in the tomb, and that they were present, and asked Plowden's question: "Did you intend that the statute of limitations you have just passed should bar foreign merchants of their actions for just debts, where they have been prevented by war from bringing suits for the recovery of them?" I presume there is no man who hears the question asked would hesitate a moment in concluding that the answer would be *una voce*, we had no such intention. It was only designed as a municipal regulation among the inhabitants of this province, at the time, and never was intended to bar the rights of foreign creditors from the recovery of their debts.

But granting the utmost that was contended for, that it was intended to bar foreigners, as well as citizens, after the limited time mentioned in the act, from maintaining suits at law, will not the declaration of war suspend the operation of the act? Especially as it was an event that the legislature of 1712 could not have foreseen or guarded against, or indeed, if it could have been foreseen, it did not lie with a colonial legislature to have regulated commerce or commercial rights; that was a subject for the consideration of parliament, the supreme legislature of the empire. We have already determined that one of the clauses in the executor's law of 1789, suspended the operation of the limitation act, as it prevented a man from suing an executor until after the expiration of nine months from the death of the testator, although there are no express words in the executor's law to that effect. Now there is no doubt in my mind, but that the act of congress of June, 1812, which is the supreme law of the land, declaring war against Great Britain, is perfectly analogous to the executor's law in this respect; for by its operation it prevented British subjects from suing during the war, as much, and consequently was as much a suspension of the limitation act as express words could have made it; for by the act of war, our courts of justice were shut up against British creditors, as effectually as they were during the nine months, by the executor's law against our own citizens.

So covenants are repealed or extinguished by acts of parliament, as where A. covenants not to do a thing which it was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So, if A. cove-

nants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, it in like manner repeals the covenant: *Brewster v. Kitchell*, Salk. 198; 5 Co. 7; 2 Bac. 30. Now it is evident that privilege allowed to aliens to bring suits for recovery of debts, amounts to a covenant on the part of the state that it shall be lawful for them so to do. And the language of the limitation act is, that they shall do so within five years. But if an act of congress, which is a paramount act, comes in and says they shall not maintain any suit during time of war, which the declaration of war proclaims to the world, surely this amounts to a repeal or suspension of the limitation act (which calls upon them to bring suit within five years) as long as the war lasts, as effectually as an act of parliament repeals or suspends a covenant solemnly made and entered into under the hand and seal of the party. To give it any other construction would be the extreme of injustice; contrary to all the principles of reason and equity laid down by Plowden, Lord Coke, and the other authorities quoted.

But by giving this construction to the act, the rigor and severity of the text of the law is softened; it is reconciled to reason and justice, and the rights of innocent individuals abroad, who reposed faith in the laws of our country, are preserved and protected by it. Courts of equity have likewise given this reasonable construction to the act of limitation; for it has been determined that if the statute of limitations attaches upon a demand pending a suit in equity, the court would take care to preserve the plaintiff's right, and would not suffer the statute of limitations to be pleaded against the demand in a court of law: *Farrington v. Chute*, 1 Vern. 74. So, likewise, it has been held that if there be no *laches* on the part of the plaintiff, he shall not be barred by the statute of limitations, as where there is no executor against whom a suit could be brought after the death of the testator, the parties shall not be barred, provided the suit is brought in due time afterwards: *Joliffe v. Pitt*, 2 Vern. 695; *Webster v. Webster*, 10 Id. 93. Now, in the present case, no *laches* can be imputed to the plaintiff, as during the war he could not maintain his suit, but as soon as peace was restored, the action was commenced.

In the course of the argument, it was mentioned that a case had been tried before Mr. Justice Johnson, in the federal court, similar to the one under consideration; and that he had decided that the statute of limitations would not run against a British creditor during the war. I have since asked the judge

for his notes of the case, when he informed me he had made such a decision in a case in which John Haslett was a party, and he wished the point to be carried up to the supreme court, but the parties afterwards acquiesced in his decision. It may, however, be considered as a *nisi prius* case, and is directly in point. From every view, therefore, which I have been able to take of this new and important subject, and from all the authorities which I have been able to examine which have a bearing upon it, I am decidedly of opinion that the declaration of war amounted to a suspension of the limitation act against British creditors, and that the whole of the time which elapsed from its declaration to the day when peace was proclaimed, ought to be thrown out of the computation of time mentioned in the statute for barring a plaintiff of a just demand, and consequently that the recorder's decision in the city court of Charleston ought to be affirmed, and that the *postea* should be delivered to the plaintiff, to enter up his final judgment thereon.

COLOOCK, JOHNSON, and HUEB, JJ., concurred.

In *Hanger v. Abbott*, 6 Wall. 532, where the principal case is relied on, it is held that the time during which the courts in the lately rebellious states were closed to citizens of the loyal states, is, in suit brought by them since, to be excluded from the computation of the time fixed by statutes of limitation within which suit may be brought, though exception for such cause be not provided for in the statutes. So, in *Ross v. Jones*, 22 Wall. 576, where the rule is applied between persons in different states of the late confederate states. It is remarkable that this subject is not discussed in Angell on Limitations; nor do we find these cases noted on this point in the last edition of this standard work. Late decisions hold the statute to be suspended during war: *Selden v. Preston*, 11 Bush, 191, relying on the principal case; *Jones v. Nelson*, 51 Ala. 471; *Ahnert v. Zaun*, 40 Wis. 622.

But the statute is not suspended where the persons are residents of the same state: *Smith v. Charter Oak Ins. Co.*, 64 Mo. 330.

## SAWYER v. EIFERT.

[2 NOTT & McCORD, 611.]

**CONSTRUCTION OF WORDS IN SLANDER.**—In an action of slander the words are to be construed as they were, or should have been, understood by the person to whom they were addressed.

**IMPUTING FELONY BY A QUESTION.**—A charge of felony may be made by a question as well as by a direct allegation, if it was so meant, and this is a question of construction.

**EVIDENCE OF CHARACTER IN SLANDER.**—In an action of slander, evidence of the plaintiff's general bad character, but not of a particular criminal act other than that imputed to him, is admissible in mitigation of damages.

ACTION of slander for charging the plaintiff with having stolen iron and steel from the defendant. The words were proved to have been spoken in the form of a question. The defendant moved for a nonsuit on the ground that the words proved were not actionable, but the motion was overruled. He then moved for leave to give in evidence the general character of the plaintiff, and also the record of his (plaintiff's) conviction for perjury, by way of mitigating the damages; but both motions were overruled, and the plaintiff obtained a verdict. The defendant moved for a nonsuit or a new trial: 1. Because the words proved were not actionable; and, 2. Because the evidence offered by the defendant was improperly rejected.

*Bansket*, for the motion.

*A. P. Butler*, *contra*.

By Court, Nott, J. It is now very well settled that words are to be construed by a court and jury in the same manner as they were or ought to have been understood or construed by the person to whom they were spoken. A person may convey a charge of felony as well by way of question as by a direct allegation. And it must always be a question of construction, whether such is his meaning or not. The question was therefore properly referred to the jury, and the motion for a nonsuit must be refused.

The motion for a new trial admits of two questions: 1. Whether the defendant ought to have been permitted to give the general character of the plaintiff in evidence, by way of mitigation? 2. Whether he ought to have been permitted to give evidence of a particular crime committed by him, of a distinct character from that with which he was charged?

The first question appears to me to be settled in the case of *Buford v. McCluney*, 1 Nott & McCord, 268, and on grounds perfectly satisfactory to my mind. There can be nothing more unreasonable than that a person who, by a long course of vice, has proved himself to be so destitute of every moral principle as to be capable of committing any crime, should be entitled to recover the same damages in an action of slander as a person of spotless fame, merely because he has not acquired any general character, with regard to the particular crime of which he has been accused. It is within our daily experience, that there are persons in every community so destitute of character, or rather, so notorious for their bad characters as to furnish good grounds of belief that they are capable of committing many offenses, of

which they may never have been accused, and for which they may not have acquired any particular character. Suppose a person who had been guilty of felony and robbery until his personal safety rendered it necessary that he should banish himself from society, should live in the woods and support himself by rapine and plunder, would any one hesitate to believe, if such a person should be accused of committing a rape, or of swearing falsely, that he was bad enough to do either? Yet, in an action of slander for such a charge, if the testimony was restricted to the character of the person with regard to those particular crimes, the defendant would probably fail in his proof.

But I will illustrate the principle by another case, which I believe does not unfrequently occur. There are in every community men who from long habits of drunkenness, rioting, swindling, stealing, and associating with rogues and felons, are considered fit instruments for the perpetration of any crime. Should such an one be brought into court as a witness, to establish the innocence of a man as bad as himself, perhaps an accomplice, might not any one believe that he had committed perjury? In an action of slander for such a charge, might not his general character be proved by way of mitigation, though he had never been sworn in a court of justice before, and therefore could never have been suspected of such a crime? I think it is a question respecting which we ought not to hesitate, and it appears to me that the law which has been cited to prove the contrary establishes the principle. Mr. Starkie, in his treatise on slander, says a "man of bad character is not to be represented as worse than he really is, and therefore is entitled to a compensation, to be measured by the excess beyond what is due to him;" cited in *Buford v. McCluney*, 1 Nott & McCord, 272. What does he mean by saying that the compensation is to be measured by the excess beyond what is due to him, if the defendant be not permitted to investigate his character to ascertain how far the charge has exceeded the truth? It is to be observed that this opinion only goes to allow the general character to be given in evidence; but not particular traits in his character, different from that charged. It is true, the party whose character is thus attacked may require the witness to give the reasons and grounds for his opinion, and this may lead to evidence of particular facts. But that is for the benefit of the plaintiff, who if he will require his character to be particularly investigated, must suffer the materials of which it is composed to be examined. And if, when his whole character is

before the jury, they think it to be so bad that it cannot be injured, they will and ought to give only nominal damages. But if the defendant fails in that part of his defense, the plaintiff will have the benefit of it.

It is asked, if the plaintiff has a right, on his cross-examination, to reduce the questions down to the particular instances in which his character is vulnerable, for what purpose will you go into an investigation of his general character at all? The reason is obvious. If the defendant succeeds in establishing the general character, he so far succeeds in the object of his defense. But his attempting to do so will not preclude the plaintiff from disproving the fact. Proving a particular defect in the character of the plaintiff will not necessarily operate as a mitigation of the defendant's offense. It will be a matter for the consideration of the jury, and may often produce a contrary effect.

2. After these observations, it would seem that little need be said on the second question. The evidence offered of a particular crime was properly rejected. A person cannot be supposed prepared to answer evidence of any particular offense. Besides, the fact that a man has committed one crime does not furnish any excuse for a person maliciously, and without any cause of suspicion, to charge him with another. It is only where the character is so bad as to furnish the grounds of belief that he is capable of committing any crime, that such evidence is to be allowed. It is true, the extent of the proof cannot be seen until it is heard. It then becomes a question of fact for the jury, who will give it the weight to which it is entitled, and no more.

The opinion of the court, in the case of *Buford v. McCluney*, was delivered by myself, and if there is anything in that opinion which authorizes the inference that a person may say before a tribunal of justice: "I did utter the slanderous words charged; they are not true; I never heard it uttered by human tongue that the party was guilty of the crime they express; the charge arose in the wantonness of my imagination, and was uttered in the maliciousness of my heart; but I am not liable to damages, because the plaintiff is not a man of good general character," I have been most unfortunate in my manner of expression. Or, if I have conveyed an idea that the real injury done to the character of a person should be the only rule for estimating the damages, or that the defendant may plead the general character of the plaintiff, in justification of a ground-



less and malicious slander, I have been equally unfortunate, and I avail myself of this opportunity to remove the impression. I admit that a person of bad character may be unjustly slandered, and may be entitled to heavy damages for such slander. But I hold that good character, either general or special, is the substratum of every action of slander, and that a jury, in estimating the damages, should have a regard as well to the character of the plaintiff as to the malice of the defendant. And that a woman ought not to be taken from the stews and brothels of a town, to be placed along side of the most respectable ladies, who equally adorn our drawing-rooms and our churches. Nor that the high priest of vice and corruption should be ranked with the pious priest of the parish, or the respectable bishop of the diocese. Where a person's character is such that he cannot safely trust it to a court and jury, slander can do him but little injury. And a person who is neither ashamed nor afraid to expose his character to the eye of the public, ought not to be permitted to shelter it under the forms of law from the eye of a jury.

I am of opinion that a new trial ought to be granted, on the ground that the evidence of general character was refused.

COLCOCK, and RICHARDSON, JJ., concurred.

GANTT, J., dissented.

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## RAINWATER v. DURHAM.

[2 HOTT & McCORD, 224.]

**INFANT'S LIABILITY FOR NECESSARIES.**—An infant is liable on his contracts for necessities only, and then merely for their actual value; and a horse does not properly come under the designation of "necessaries."

**ASSUMPSIT** on a promissory note. Plea, the general issue. The evidence was that the note was given for the purchase of a horse, and that the defendant was an infant at the time, though he was married and supporting himself on a farm. The horse was proved to be worth not more than half the price agreed on, and was the only one owned by the defendant.

The plaintiff had a verdict, and the defendant moved for a new trial, on the ground that the horse not being "necessary," the defendant was not liable on his contract therefor, and that in any event he was liable only for its value.

By Court, HUGER, J. On the first ground, I have felt some difficulty. The English decisions have latterly very much en-

larged the circle of necessities for an infant. In the case of *Hands v. Slaney*, 8 T. R., it was decided that a livery for a servant was necessary to an infant, who was an officer in the army. A case is said to have been decided by Mr. Baron Clarke, and referred to in Bull. N. P. 154, in which it was ruled that sheep were necessary to an infant who was a farmer. But with this case I am not satisfied, nor do the English appear to have been satisfied with it. In the case of *Whywell v. Champion*, Str. 1083, it was ruled that goods furnished an infant who was a shop-keeper were not necessary. And in the case of *Dirth v. Keighley*, it was decided that the work done for a glazier and painter, who was an infant, although done to articles in the way of his trade, was not within the meaning of the term necessary. The object of the law is to guard the infant against his supposed indiscretion. To render him liable, however, for the contracts that may be supposed necessary to a farmer, a trader, or a glazier, is to attribute to him a discretion which negatives the presumption of law. I am of opinion that the horse was not, in this case, such a necessary as entitled the plaintiff to a recovery.

On the second ground I will only observe that could the rule have been so far stretched as to include a horse within necessities, the defendant would have been only liable for the value of the horse.

The motion is, therefore, granted.

COLOOCK, and RICHARDSON, JJ., concurred.

JOHNSON, and GANTT, JJ., dissented.

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### DENTON v. ENGLISH.

[3 NOTT & MCCORD, 551.]

**IMMORAL CONSIDERATION.**—An executed contract, founded on an immoral consideration, is binding on the parties at common law.

**ACTION** of trover to recover the value of certain slaves. The plaintiffs claimed ten of the negroes under a bill of sale from one Fitzpatrick, now deceased, to Mrs. Denton, then Miss Gillespie. A money consideration was expressed in the bill, but the evidence showed that the real consideration of the contract was future illicit cohabitation between the said Fitzpatrick and the said Miss Gillespie. It was proved that the contract was fully executed by the signing, sealing, and delivery of the

bill of sale, and by delivery of possession of the negroes, and that Fitzpatrick, by his will, made Miss Gillespie, who lived with him to the time of his death, his sole executrix, and allowed her compensation for the time that the negroes had been employed by him after the bill of sale. She kept separate and entire possession of the negroes from that time until the conversion by the defendant. The defendant claimed that the plaintiffs were not entitled to these negroes, because the contract was *contra bonos mores*, and upon that point the jury found for the defendant under the direction of the court; whereupon the plaintiffs moved for a new trial upon grounds which appear from the opinion.

*Gregg*, for the motion.

*Blanding*, *contra*.

By Court, JOHNSON, J. The question propounded assumes two positions: 1. That this was an executed contract; 2. That it is not affected by any statutory laws.

To support the first of these positions, it will only be necessary to remark that an executed contract consists in the performance of everything necessary to be done according to the terms of the contract by the party contracting, so as fully to invest the party contracted with dominion over the thing parted with: 1 Powell on Cont. 234. The bill of sale, which furnishes the only evidence of the contract, does not provide for any subsequent act to be done by Fitzpatrick, and Miss Gillespie's possession of the negroes under it, gave her complete dominion over the negroes mentioned in it. It follows, therefore, that this was an executed contract.

It is admitted that the negroes mentioned in the bill of sale were not equal in value to the one fourth part of the real and personal estate of Fitzpatrick at the time of the execution of the bill of sale, so that the contract is not affected by the act of assembly of 1795, usually called the bastardy act: 1 Brev. 68; which declares all deeds of gift, conveyances, legacies and devises, made in favor of an illegitimate child, or a woman with whom one lives in adultery, void, so far as it exceeds the one fourth part of his real and personal estate, such persons having a wife or children living at the time. The question is, therefore, to be determined on the principles of the common law.

On the part of the plaintiff, it is conceded that an executory contract, founded on the consideration to which the question made supposes, I mean in consideration of future cohabitation

and prostitution is void, as being *contra bonos mores*, and would impose no legal obligation on the parties: 1 Powell on Cont. 183. The right of the plaintiff to recover, therefore, depends upon the distinction between the legal effect of an executory and an executed contract, if there be any.

That there is a distinction is, I think, manifest. Mr. Powell, in his essay on Contract, 1 vol. 200, observes: "That although contracts or agreements respecting things which the law prohibits to be the subject of contracts, create no right, and consequently no obligation on either side, yet the law suffers them in some instances, nevertheless, after they have been carried into execution, to prevail contrary to its prohibition; for being executed, they are valid between the parties, although the law will not give its aid to assist either party in carrying them into execution; for the parties are looked upon to treat together as if there were no law about the matter, and so to renounce the benefits which might accrue by the law to either of them; and, therefore though they do ill to engage themselves, they ought in conscience to suffer their engagements, being executed, to continue in force, and neither of them ought to break without the assent of the other: 2 Comyn on Contracts, 109. The only exceptions to this rule which are noticed by Powell are those which arise out of positive enactments by statute, when the remedy is expressly given, or when it is necessary to enforce the general provisions of the statute. These statutes are classed: 1. Into such as are founded on general reasons of public policy; and, 2. On such as are intended to protect weak and necessitous persons from being overreached, defrauded or oppressed. To the first of these classes of prohibited contracts, the common law rule, that when the parties are *in pari delicto melior est conditio possidentis* applies, and it is only in cases arising under the second class of contracts prohibited by statute that a remedy is given: Powell, 202, 203, 204.

I have been induced to notice the doctrine arising out of the construction of prohibitory statutes, under the impression that all the difficulty which exists has arisen out of confounding these decisions with questions arising at common law, for after a careful research, I have not been able to find a single exception, in cases arising on common law principles, to the general rule, that when the parties are *in pari delicto melior est conditio possidentis*. And no possible case has presented itself to my mind which would constitute an exception. The act of assembly usually called the bastardy act, before referred to as a leg-

islative interpretation of the common law, furnishes a strong argument that this case at least was not an exception to the rule. That act restrains the party from bestowing more than one fourth of the value of his real and personal estate on a bastard child, or a mistress, if the donors have a wife or children. Now if such a disposition had been wholly void at common law, the prohibition in this statute was idle and nugatory, and the statute, instead of imposing restraints, should have legalized such a disposition of the one fourth part of his estate to such purposes.

The application of this rule to the present case is easy. Fitzpatrick at least was *in pari delicto*. In the absence of proof, the presumption is that he pursued and seduced Miss Gillispie, and the facts reported abundantly prove it. I think, therefore, that the plaintiff's motion for a new trial ought to prevail.

GANTT, and RICHARDSON, JJ., concurred.

COLCOCK, J., dissented.

## BOWIE v. NAPIER.

[1 McCORD, 1.]

**FACTOR FLEDGING GOODS.**—A factor cannot pledge his principal's goods for his own debt. But it is equally clear that when a consignee, acting within the scope of his authority, employs a sub-agent to carry that authority into execution, as by selling goods consigned to him, or doing any other act within that authority, that such sub-agent has a lien on the goods upon which he has made advances for the purposes of a sale.

**ACTION** to recover the amount of goods sold, under the following circumstances: The plaintiffs, residing in Scotland, consigned certain packages of goods to one McCoul, in Charleston, for sale; McCoul being both a merchant on his own account and a factor. In March, 1818, he deposited with the defendants, factors, certain merchandise belonging to himself, and also the goods consigned to him by the plaintiffs, with directions to sell as opportunity offered. The defendants, on the receipt of the goods, became responsible for the duties upon them, which they had since paid, and made to McCoul large advances upon them. No distinction was made at the time of delivery between those goods that were the property of the plaintiffs, and those of the consignee, but the defendants believed the whole to belong to McCoul; which belief was strengthened by a bill of lading,

as follows: "Paisley, twelfth of December, 1817. Consigned Mr. Walter McCoul, per the Betsy. Thomas Taylor, from London, for Charleston, under full insurance by Henry Bowie & Sons. Marked W. M."

On the eighteenth of February, 1819, the plaintiffs, by their agent in Charleston, demanded from the defendants the proceeds of such of the goods specified in the above bill of lading as had been sold, and the return of those unsold. This was the first intimation given to the defendants that the plaintiffs claimed the goods. The notice was given after the sale of part of the merchandise. The defendants refusing to comply, suits were brought to recover the amount for the goods sold, and for a return of the goods still unsold. The goods remaining unsold at the time of the notice were afterwards disposed of by the defendants; and upon debiting the consignee with the amount of duties paid and advances, a balance still remained due the consignee, which had not been paid. It was shown that it was the custom of merchants in the state to obtain advances on goods consigned to them by foreign merchants by depositing them with an auctioneer, who, when he sold, reimbursed himself for his advances.

The counsel for the plaintiffs argued: 1. That the consignee having only authority to sell, could not pledge; 2. No custom could prevail against a positive rule of law; and, 3. Admitting the custom to be reasonable, it must be shown to have existed here before the adoption of the common law. He cited to the first point: 1 Com. Contr. 236-7; 1 Livermore, 129, 141; 1 Mau. & Sel. 140; Id. 484; 2 Id. 298; 2 Mass. 398; *Van Amringe v. Peabody*, 1 Mason, 440; *Newsom v. Thornton*, 6 East, 17, 25; *McCombie v. Davies*, Id. 538; 7 Id. 5. To the second point: 2 Johns. 335.

The counsel for the defendant claimed that commercial usage was the law of a country: *Collins v. Martin*, 1 Bos. & P. 643; 7 T. R. 355; *Pulney v. Keymer*, 3 Esp. 182; Id. 268; 2 Bell Com. 76, 79, 80, 319.

The court below held, the plaintiff was not entitled to recover, and a verdict was found for the defendants. A motion was made for a new trial on the grounds: 1. Because, by a settled rule of commercial law prevailing in the state, a factor or consignee cannot pledge the goods of his principal for his own debt; 2. Because no evidence of mercantile usage can be received to contradict a settled rule of commercial law; and, 3. Because the charge of the court was contrary to law.

By Court, COLCOCK, J.\* As to the first ground, the court are unanimously of opinion that a factor cannot pledge the goods of his principal for his own debt; and although it should be considered as a hard rule, and sometimes producing the most injurious effects on persons acting under the purest motives, yet the long train of decisions put it out of the power of the court to question the doctrine.

As the judges of England say, it is vain for us now to speculate on the subject. The authorities referred to by the counsel are recognized as law by the court. But it is equally clear from the cases, that when a consignee acts within the scope of his authority, and employs a sub-agent to carry that authority into execution, as by selling goods consigned to him, or doing any other act within that authority, that such sub-agent has a lien on the goods, on which he has made advances for the purposes of a sale: 7 T. R. 355; *George v. Claggett*, 3 Esp. 182, 268; 4 Camp. 60, 349.

In the case of *Martini v. Coles*, 1 Mau. & Sel. 147, Lord Ellenborough says: "The defendants therefore received the goods in order to sell them, which makes the only distinction between this and the former case, viz., that here the possession of the defendants was legal in the first instance. The defendants, then, being authorized to sell the goods, if they had advanced money for any purposes connected with the sale, and for which brokers, in the ordinary course of disposing of goods, are accustomed to advance, they would have had a lien in respect of such advances; but no claim of that sort is advanced."

The question then is, whether this was a pledge for a pre-existing debt, or one contracted at the time of the consignment; or whether the money was not advanced in the usual mode of business, and for the purposes of effecting a sale? In the first place, I think there is such a marked difference between a pledge and a deposit for sale, that it would seem astonishing they should ever be confounded.

By a pledge, we understand not only a thing that may be redeemed, but generally one that is intended to be redeemed. Now, when goods are deposited with orders to sell, such an idea as that of redemption can never enter the mind; for the agent with whom they are deposited may, in the shortest space of time, alienate the right; and if he be engaged in much busi-

\* The court at this time was composed of Bay, Nott, Colcock, Gantt, Johnson, Richardson and Huger, JJ.

ness, and the articles salable, often times does so. But it is said the authority to retain in England, for advances made, is confined only to brokers, whose business is generally understood to be to effect sales, and who are legally authorized agents. If the principle be admitted because such agents in England are necessary, and are, in consequence of their duties, often times obliged to advance money, I would ask, why not, under the same necessity, the same consequence with us? We are a commercial people, to a certain extent. A consignee may require the aid of a sub-agent here as well as in England, and why not that sub-agent be allowed here to retain for his advances made in the way of his business as well as in England. He performs the same duties, although perhaps not in the same manner; he stands in the same relation to his principal in other respects; why not in the most important one? The answer is, because he is called vendue-master, and not broker. In this country, nothing is more common than for the same man to act in different characters; and rather than sacrifice principle to a name, we will call him a broker. He is licensed by the public, and enters into bond and security. His business is as well known here as that of any broker in England, and it is the same.

As it appears to the court that the defendants came legally into the possession of the goods, without any knowledge of any other claimant than the consignee; that they were deposited *bona fide* for sale; that they advanced, as was usual, money on these goods, by paying the duties and the price to the consignee, McCoul, they are of opinion that the motion should be discharged.

GANTT, HUGER, and JOHNSON, JJ., concurred.

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## SOUTH CAROLINA SOCIETY v. JOHNSON.

[1 McCORD, 41.]

**SURETIES — TIME FOR WHICH BOUND.**—Where an officer, who is elected annually, gives a bond for the faithful discharge of the duties of his office, his sureties are bound only for one year, although no time is specified in the bond, and although he should be elected several years in succession.

**PAROL EVIDENCE EXPLAINING DEED.**—Though a reference is made in a deed to extrinsic matter, to explain which parol evidence may be necessary, this will not authorize such evidence to be given to explain or contradict the deed itself.



DEBT on a bond against the defendant, as one of the sureties of Peter Trezevant, treasurer of the South Carolina Society. He was elected treasurer on the fourth of October, 1808, to fill an unexpired term. In accordance with the rules, he was re-elected on Easter Tuesday, the following year, when the defendant became his surety. He was re-elected every succeeding year until the year 1814, but no new bond was taken at any re-election. The treasurer accounted regularly, whenever required, until August, 1813, when upon examination a deficiency was discovered, amounting to two thousand three hundred and thirty-two dollars. It appeared from the minutes of the society, that on the thirty-first August, 1813, the society demanded of the treasurer a new bond, with sureties, for the term of the last election, or that, in addition to that given on his first election, his sureties should stipulate for the faithful discharge of his duties as treasurer, under his then or any future election, the bond on which the action was brought being deemed invalid after the first election. This was refused. No defalcation had taken place before August, 1813, when it was reported to the society. Trezevant continued in office until October, 1813, when he sent in his letter of resignation, which was accepted.

One Bee was offered to testify, to whom objection was made that he was an officer, but the objection being overruled, he testified that new bonds on the re-election of the same person had not been previously required, and that the officers take the bonds and do not report the sureties to the society; that it was not the practice to take new bonds; but it was not the understanding that new bonds should not be taken. This testimony as to the practice of the society was objected to by the defendant's counsel, as the rules required an annual election, and that any practice or negligence could not affect the legal liability of the defendant, or extend his responsibility beyond the year; and no parol testimony should be permitted against these rules. The objection was overruled.

A motion being made for a nonsuit, the court refused it, and instructed the jury in favor of the plaintiff, and the jury found a verdict for the plaintiff.

A motion was now argued for a nonsuit.

*McCall and Hayne, attorney-general, for the motion.*

*Simons and Waring, contra.*

By Court, NORR, J. I have taken the brief which has been delivered by the counsel for the defendant, as containing a cor-

rect report of this case. The several questions growing out of it, which have been submitted to us in the course of the argument, are as follows:

1. Whether the legal effect of the bond in question is to make the defendant liable, after the expiration of one year; being the period for which Mr. Trezevant was first elected, when he became his security?

2. Whether parol evidence was properly admitted to show the intention of the parties; and if it was, whether it has given the bond a more extended operation than would otherwise have been given to it?

3. Admitting Colonel Johnson to be bound only for one year, whether there was not sufficient evidence before the jury to sustain the verdict; at least for a part, if not for the whole?

The condition of the bond is in the following words: "The condition of the above obligation is such that if the above-bound Peter Trezevant, John Johnson, jun., Charles B. Cochran, and Hugh Patterson, their certain attorneys, heirs, executors, or administrators, or any of them, shall and do well and truly deliver in good order unto the above-mentioned South Carolina Society, whenever the same shall be demanded or called for, at any of their regular meetings, (fire and like unavoidable accidents excepted), the several bonds, notes and sums of money, with the silver plate belonging to the South Carolina Society; which bonds, notes, plate and sums of money are for greater certainty specified and contained in a schedule, dated the thirteenth day of January, 1809, and subscribed by the said Peter Trezevant, and delivered to Thomas Roper, esquire, the present steward of the said society; and also, shall at all times, when required, render a true and faithful account of the moneys from time to time that shall be delivered to him by the said society, or received by him in their behalf, and in every matter and thing faithfully shall discharge his trust as treasurer of the said society, then this obligation to be void and of no effect, or else to be and remain in full force and virtue."

It does not appear upon the face of this bond for how long a time its obligation was intended to continue. But its object appears to be to secure the faithful performance of Mr. Trezevant's duties as treasurer of the South Carolina Society. The duration of the bond, therefore, must be determined by the duration of the office.

By a reference to the rules of the society, it appears that the treasurer was elected only for one year. The legal operation of

the bond, therefore, cannot be carried beyond that period. Neither can it be extended by the accidental circumstance of his having been re-elected. It must continue to have the same construction as would have been given to it at the time of its creation. Such, I think, would have been its construction upon principle, without regard to authority. But it is amply supported by authority: 2 Saund. 411; *Wright v. Russell*, 3 Wilson, 530; *Baker v. Parker*, 1 T. R. 287; *Strange v. Lee*, 3 East, 484; 4 Bos. & P. 34, 40; *Pro. Liv. Wat. Works v. Harpley*, 6 East, 507; 5 Bos. & P. 174; 2 Mau. & Sel. 363; *Com. Accounts v. Greenwood*, 1 Eq. 452.

It is true that in most of these cases the term of office is expressed in the bond, or may be inferred from its language and provisions. But whether it is expressed in the bond, or fixed by law, cannot make any difference; and the rules of this society are the law to all the members belonging to it. The case of the *Commissioners of Public Accounts v. Greenwood*, 1 Eq. Rep. 450, is directly in point. The defendant had been security for the treasurer of the state, who had been elected annually.

There was no time mentioned in the bond, and the court of equity held that he was not bound beyond the first year. A distinction is attempted to be made between an office of a public nature, and a private office of a self-created society. Every member of the state, it is said, is supposed to know the laws of the state. But it may be answered that the members of every society are presumed to know the laws of that society. The strongest case in favor of the plaintiff is the case of *Hughes v. Smith*, 5 Johns. 168.

That was an action brought by a sheriff on a bond given for the faithful performance of the duties of a deputy sheriff, by one of the defendants, "as long as he should continue in that office." The sheriff had been re-elected after taking the bond, and the deputy had been continued in office, without any new appointment. The question was, whether the bond continued to be obligatory after the re-election of the sheriff? The court held that it did; because, although the sheriff was re-appointed, the deputy was not, neither was it necessary that he should be. His office continued on uninterrupted, and therefore the bond continued operative.

The grounds of that decision were, that as there was no point of time when the sheriff was not actually in office, the office of the deputy did not cease with the expiration of the term of office of his principal. With all the respect due to the able

bench of New York, I am not prepared to say that I should concur with that decision. But it is deducible even from that case, that if the office of the deputy had expired with that of his principal, or if he had actually been re-appointed, the obligation of the bond would have ceased.

I think, therefore, that the defendant was not bound beyond the first year that Mr. Trezevant was in office. On the second ground, the amount of the argument on the part of the plaintiff is, that the bond on its face does not appear to be limited in its duration. The defendant, therefore, is obliged to resort to parol evidence to fix its limits, and that permitting the defendant to go into parol evidence, opens the door for the plaintiffs to go into similar evidence to show the intention, and that the intention must prevail, even though it be contrary to the language of the deed itself. But I think the counsel is mistaken, both with regard to the facts and the conclusion which he has drawn from them. We cannot, to be sure, from the bond alone, ascertain the period of its duration. Neither can we ascertain that there has been a breach of the condition. The first resort to parol evidence then, is on the part of the plaintiff, to show a breach of the covenant contained in the condition. The object of the testimony on the part of the defendant is to repel the proof adduced by the plaintiff, by showing that the bond has become a dead letter, before the breach assigned could have happened. But it is not parol evidence. He relies on the constitution of the society, which, in relation to everything affecting the members of the society, is as high evidence as the constitution of the state.

But suppose the defendant has proved the same fact by parol, the conclusion attempted to be drawn from it would not follow. Wherever a deed refers to anything extrinsic or foreign to the deed itself, it must be established or identified by parol evidence. Thus, for instance, when a conveyance or grant of land calls for certain marks or monuments as evidence of its metes and bounds, those marks and monuments can be identified only by parol evidence; such evidence would be consistent with, and not contradictory to the deed. It certainly would not authorize the opposite party to go into evidence to show that the intention of the parties was different from the legal import of the writing itself. If a person should enter into a covenant to deliver to another all the cotton which he had in a certain warehouse in Charleston, it would be necessary to show by parol evidence how much cotton he had in that warehouse at

that time. But that would not make it competent to show that he meant a part, and not the whole, or for the other to show that he was bound to deliver all that might be in the warehouse at any indefinite period afterwards. So where, by the production of parol evidence, one part of a deed is made to appear inconsistent with another part of the same deed, that inconsistency or ambiguity thus raised may be explained by the same kind of testimony. As if a grant should call for a line running south to a particular river, which should be found on the north, it might be explained by parol evidence, because the river itself, as well as its relative position to the land, would be a part of the description. But that would not give a license to show that it was the intention of the parties to extend the line a given distance beyond the river. The intention ought to prevail; but then it must be collected from the deed itself. A deed may be couched in language so strong as to control the legal effect of technical terms in aid of the intention of the parties, but it cannot be altered or explained by parol evidence, except where is an ambiguity. I think, therefore, that the evidence offered to show the intention of the parties ought not to have been received. I do not think, however, that it altered the complexion of the case; it merely went to show that the society had neglected to renew the bond at each annual election. But it does not follow that because the defendant was a member of the society he must have been acquainted with the fact; neither is it material whether he was or not; it could not alter his responsibility. He certainly did know that his principal was elected for one year only, and it is reasonable to presume that he as certainly concluded that his liability ceased at the expiration of the year.

I come now to the last question which has been submitted to our consideration. If it were doubtful whether the delinquency might not have happened during the first year that Mr. Trezevant was in office, the case ought to be sent back to another jury; but the testimony satisfactorily removes that doubt. The part of the bond in which the breach is assigned, is in these words: That he "shall, at all times, when required, render a true and faithful account of the moneys, from time to time, that shall be delivered to him by said society, or received by him in their behalf." It appears by the evidence presented to us, that he did render a true and faithful account, according to his covenant, at the expiration of that year. It also appears by the accounts of his successor, that all the moneys were paid over to

him. He was, indeed, his own successor, and acknowledged the money in his hands, and the society appears to have been satisfied with his accounts for several succeeding years. It is apparent, therefore, that the defalcation happened several years after the liability of the defendant ceased to exist. The action ought not to have been sustained, and the motion for a nonsuit must be granted.

BAY, GANTT, RICHARDSON, and HUGER, JJ., concurred.

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### WITTER v. HARVEY.

[1 McCORD, 87.]

**OWNERSHIP OF ROAD BOUNDING LAND.**—Where two tracts of land call for a road, as the dividing line, the owners on each side hold to the middle of the road.

**DEDICATION OF ROAD.**—Where a person lays out a road through his own land, and for his own convenience, it is not a dedication of it to public use, unless it leads to a market, or other public place.

**TRESPASS** for cutting down a gate which the plaintiff had erected across an avenue running through his plantation.

It appeared that Isaac Rivers formerly owned two tracts of land on James' Island, then forming one entire tract. He afterwards purchased a tract lying on the north side of a public road, which divided it from the other land, and built a house thereon; and from the house he laid out an avenue running south through the tract he formerly owned, dividing it thus into two parcels. He devised one of these to his son, Josiah Rivers, describing it as lying on the east side of the avenue, and bounded by it; and devised the other to Gracia Rivers, and described it as lying on the west side of the avenue, and bounded in the same way.

The two tracts, after several transfers, came to be united in the plaintiff, who claiming title to the avenue, erected the gate in question. The defendant disputed his right, entered and cut down the gate.

Verdict, pursuant to instructions, was given for the defendant. Motion for a new trial.

By Court, NORR, J. Several views of this case have been presented to the court in the course of the argument. But the only question which it is necessary to consider is, whether the jury were correctly instructed with regard to the law. For if

they have predicated their verdict on a misconception of the law, the plaintiff is entitled to a new trial, although possibly the testimony may have authorized the same result if the law had been correctly stated to them. We are already authorized to presume that the jury pay that respect to the opinion of the court, on a point of law, as to be governed by it, except where the contrary appears by the verdict itself. And from the best consideration I have been able to give the subject, I am of opinion that the land passed under the will. That the plaintiff having united the two tracts B. and C., had acquired a title to the avenue; and was therefore entitled to a verdict.

I take it to be a conceded principle of national law, that where two states are separated by a river, each is entitled to hold to the middle of the stream. It is laid down in Vattel, 110, B. 1, ch. 22, that where a river divides two nations, and neither can show a preference, the dominion of each extends to the middle of the river. It has, however, been said, that this is a principle of national law, only, and not applicable to cases of individuals. But I think it will appear to be equally a rule of municipal law, and that it applies as well to roads as to rivers. Lord Hale says that "fresh rivers do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the property of the soil, and consequently the right of fishing *usque ad filium aquæ*; and the owners of the soil on the other side, the right of soil and ownership, and fishing unto the *filium aquæ* on the other side:" Harg. Law Tracts, 5.

In the case of the royal fishery of the Banne, Dav. Rep. 149, it was resolved that rivers not navigable belong to the owners of the soil; and if such river runneth between two manors, and is the mean or boundary between them, the one moiety of the river and fishery belong to one lord, and the other moiety to the other. And this point, it is said, was resolved in this case by the rules and authorities of the common law. But, besides, it is further said in the same case that divers rules of the civil law and customary law of France, agreeable to our law in this point, were cited out of Renatus Choppinus, a very good author. It is also recognized in Pennsylvania as a rule of the common law; though held, very properly, I think, not to be applicable to the large navigable rivers of that state. [*Carson v. Blazer*, 4 Am. Dec. 463.] The same distinction, I have no doubt, would be made here. The ebbing and flowing of the tide cannot give character to our rivers, as it appears to do in England.

In rivers which are navigable for many hundred miles above the flowing of the tide, some other criterion must be resorted to. But that does not alter the principle, where it is admitted that the stream is not navigable. [See note to *Arnold v. Mundy*, *ante*, 356.]

In New York, the same rule prevails: *Jackson v. Louw*, 12 Johns. 255. All these, to be sure, were rivers and not roads; but they serve to illustrate the principle. The same rule must be applicable to both; it is one founded on necessity and convenience. The laying out of a road over a man's land does not divest the owner of the soil: *Chester v. Alker*, 1 Burr. 143; *Lade v. Shepperd*, 2 Str. 1004; 1 Will. 107; *Harrison v. Parker*, 6 East, 154; *Jackson v. Hathaway*, 15 Johns. 453 [8 Am. Dec. 263]. It only operates as a suspension of the use as long as it is required for public purposes. The reversionary interest remains unimpaired by any lapse of time.

If the land become divided, and the road be made the boundary of both parts, upon a discontinuance of the road, that interstice will be reduced to a mathematical line, which must be in the middle. In the subdivisions of the land which are daily taking place in our county, we find that the most permanent boundaries, such as rivers, creeks, and roads, are usually sought for. The occupants on neither side can claim an exclusive right; because it is the boundary of both. They cannot have a common interest, because there is no community of interest in the soil on each side. Policy forbids it, because it would lead to endless contention and strife. The various purposes of machinery to which a creek or a river may be applied requires that each should exercise an exclusive right to the middle. In the case of *Jackson v. Hathaway*, 15 Johns. 453 [8 Am. Dec. 263], Judge Platt, who delivered the opinion of the court, says, that where a stake is called for on the side of the road, and a line from thence running a certain course to another stake, and so on by specified course and distances, it will exclude the road. But he says: "Where a farm is bounded along a highway, or upon a highway, or running to a highway, there is a reason to intend that the parties meant to the middle of the highway." I think, therefore, whether we consider it upon principle or authority, we are authorized to conclude that it is a rule of national law, and of the common and the civil law. That it is the law of several of the states, as far as it is applicable to their particular situations, and not altered by any act of the legislature, I have already shown; and I think, therefore, we must consider it to be the law of this state.



I will now inquire whether this case comes within the rule? I have not the will before me, by which I can ascertain the precise words in which the devises are couched. I am obliged to rely, therefore, upon the impressions made at the argument and memoranda taken at the time. I can, however, say with confidence that there are no express words of exclusion. The testator simply devises the land on the west side of the road to one son, and that on the other side to another son, and calls for the road as the boundary of each. There is nothing, therefore, in this case to make it an exception to the general rule. It is worthy of remark, also, that A. and B. were both devised to Josiah Rivers. He sold to Benjamin Harvey, the uncle of the defendant, the tract B. "with one half of the avenue." Benjamin Harvey sold the same to Alexander Chisolm—Garcia Rivers, to whom C. was devised, sold to Jonah Rivers, and described it as bounding on Alexander Chisolm's land. So that both the devisees (and one of them the devisee of the tract A.) considered themselves as holding to the middle of the avenue. In addition, therefore, to the law, and to the policy and convenience of the rule, we have the opinions of all the parties then interested in the question.

It is, however, contended that laying off the avenue, and leaving it open for any who choose to travel that way, was a dedication of it to the public, and that it thereby became a public highway. But to lay off a road through one's own plantation, and for his own convenience, cannot be construed into a dedication of it to public use. If it had become a public market road, or even if he had permitted a church or other public building to be built at the end of the avenue, it might have admitted of that construction. But the only purpose for which this road was ever used was that of fishing and cutting the marsh grass. It is true, that through politeness and courtesy he permitted his neighbors to participate in these enjoyments. But a mere courtesy can never grow into a right. Indeed, it does not appear that any person claims the right except the defendant.

To constitute a highway, it must at least be of public utility, if not of necessity. But this was incapable of becoming a public road. Its use was necessarily limited to a few neighbors, and that for the purpose of convenience more than necessity. It is also contended that the defendant is entitled to the use of this road as appurtenant to his house. But he certainly cannot claim the land itself as an appurtenance. One separate and

distinct piece of land cannot be an appurtenance to another. Besides, the devisor has not given any appurtenances with his land; and even if he had, the use of this road could not have been one. It is not everything that is convenient to a man's plantation that can be considered as appurtenant to it. The testator owned all the lands in question; and when he owned the whole, it was convenient for him to have this road or avenue open. But it did not become appurtenant to it because his mansion-house happened to be there. It was equally convenient for the enjoyment of all his lands, and as much so to B. and C., and perhaps more than to A. And the mere reservation of a privilege for himself could not be a dedication to the use of another. Neither can we suppose that he intended to allow a privilege to one of his children which would be an incumbrance to another, and particularly, without an express declaration to that effect. It is not, however, necessary to dwell upon this point; for if the defendant has any exclusive or common right, he will have an opportunity of showing it on another trial.

I am of opinion a new trial ought to be granted, on the ground of misdirection.

JOHNSON, and HUGER, JJ., concurred.

COLOOCK, J., dissented.

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### LELAND v. CREYON.

[1 McComb, 100.]

**PROMISE TO PAY ANOTHER'S DEBT.**—If the person for whose use goods are furnished be at all liable, any promise by a third person to pay therefor must be in writing, as it is within the statute of frauds. Accordingly, where the defendant, being present with L. in a store, verbally engaged to be responsible for whatever goods a merchant should let L. have, and he let him have goods, and charged them to him on his books, for which L. afterwards paid part, the promise is within the statute and void, although the merchant made the following memorandum in his book: "The above articles were delivered to L., who was introduced by J. M. C., who agreed to be responsible for what Mr. L. may want in merchandise. Credit was given on said C. becoming responsible."

**ASSUMPSIT** for goods sold and delivered to one Leonard at defendant's request. There was no promise in writing; but the defendant verbally promised to be responsible for such goods as the plaintiff should let Leonard have. A memorandum was made by the plaintiff one or two days after the sale and deliv-

ery of the goods as follows: "The above articles were delivered to Matthew Leonard, who was introduced by John M. Creyon, who agreed to be responsible for what Mr. Leonard may want in merchandise. Credit was given on said Creyon becoming responsible."

After a motion for a nonsuit was made and overruled, the defendant gave in evidence a letter from the plaintiff to him, in which he stated, "that all his endeavors to get the balance due him from Leonard had failed; he would thank the defendant to forward said balance of two hundred and thirty-six dollars and eighty-two cents;" that he had done everything to get it from Leonard; that he had just ground for holding the defendant liable, as the latter took Mr. Leonard by the hand and said, whatever Mr. Leonard might want of plaintiff he would be responsible for; and for this reason alone he gave credit to Leonard. The defendant, therefore, contended that credit was given to Leonard, to whom the goods were charged, and the defendant could not be liable under the statute, as there was no promise in writing. The court charged the jury in favor of the plaintiff, holding the promise not a collateral but an original one; and the jury accordingly found in favor of the plaintiff.

Motion in arrest.

By Court, GAWT, J. By the second branch of the fourth section of the statute of frauds it is enacted, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The defendant relies upon this clause in the statute as a shield against the present demand. He insists that the plaintiff ought to produce a note in writing of this promise, as it was to pay the account of another.

It is answered on the other side by saying, that the credit was originally given to the defendant. And it certainly depends upon the insulated fact whether Leonard, the person to whom the goods were delivered, was or was not made a debtor for them? If he was so debited, the alleged promise would be a collateral undertaking, and to all intents and purposes void by the statute. Leonard is certainly made a debtor in the plaintiff's

iff's books for those goods; and the letter of the plaintiff unequivocally admits that Leonard was credited upon the defendant's becoming responsible. The only evidence furnished of such responsibility, however, is the memorandum made by the plaintiff in the margin of the book where Leonard is charged with the goods. This memorandum, so strongly relied on by the plaintiff, does of itself admit the fact, that the credit was given to Leonard upon the defendant's becoming responsible. The plain and obvious interpretation of which is, that if Leonard did not pay, defendant was to pay for him.

Now, admit that a memorandum of this kind was to have the effect contended for; is it not seen at once that this branch of the statute would become a dead letter, and that the statute might in every instance be defeated by the mere act of the party concerned in interest? A party might do that for himself which no number of witnesses could establish in his behalf.

The law of the case, therefore, is that if Leonard was originally liable to be sued for the goods delivered for his use, then the promise of the defendant, if ever made, would be a collateral undertaking, and void. Now, it is clear that Leonard was a debtor, and might have been sued. If no credit was given to him, it may be asked why was the book cumbered with an entry making him debtor? Why was not Creyon at once charged with the goods? The only correct answer is, that at most the plaintiff considered the defendant as collaterally responsible. Leonard was resorted to by the plaintiff as the debtor. Every exertion was made to obtain the debt from him. A part was secured. And it was only after all hope had vanished of getting the balance from him that the defendant was called on. One of the leading cases upon this branch of the statute is that of *Buckmyer v. Darnall*, reported in Lord Raymond, 1085. In that case, the plaintiff declared that the defendant, in consideration that the plaintiff, at the request of the defendant, would let, to hire and deliver to one Joseph English, a gelding of the plaintiff's, undertook and promised the plaintiff that the said English would deliver the said gelding to the plaintiff. It was insisted in that case for the defendant, as was done here, that the plaintiff ought to produce a note in writing of this promise within the statute of frauds. The case was one of doubt. Holt, C. J., Gould and Powell, JJ., were at first of opinion that the case was not within the statute, because they thought that English was not liable upon the con-

tract. Mr. Justice Powys differed. The chief justice and his associates in opinion agreed that if any trust was given to English, then the case would be within the statute; but they thought that no credit had been given to him. The case was more deliberately considered. The chief justice advised with the judges of the court of king's bench, and it was finally determined that as English might have been charged on the bailment in detinue on the original delivery, the promise made by the defendant was collateral, and within the reason and words of the statute.

Mr. Justice Holt, in delivering the opinion of the court, puts this case, a case strictly analogous to the one before us: "Suppose a man comes with another to a shop to buy, and the shop keeper should say, I will not sell him the goods unless you will undertake he shall pay me for them, such a promise is within the statute." I say the cases are strictly analogous, so far as can be judged of them from the book entries, and the conduct pursued by the plaintiff. What was really said to Creyon does not appear by the evidence; but by no correct construction of the circumstances can his responsibility be extended beyond the case put by Chief Justice Holt. In *Mason v. Wharam*, 2 T. R. 81, the line as laid down by Justice Buller, must be considered as the correct one; which is, that the person for whose use goods are furnished be liable at all, any promise by a third person to pay that debt must be in writing, otherwise it is void by the statute. The same rule is recognized in *Jones v. Cooper*, Cowp. 227, and appendix No. 6. That Leonard might have been sued is unquestionable, consequently Creyon's promise, if made, was within the statute.

No statute has been so much, and in my opinion, so justly eulogized for its wisdom as the statute of frauds. This branch of it tends to repress evil practices, which would otherwise spring up to the insecurity of all. But for the salutary influence of this statute, thousands would tumble into ruin by having their estates taken from them to answer for the debts, faults, and miscarriages of others. So far, therefore, from believing that this branch of the statute of frauds has a tendency to produce injustice and wrong, I think it the only bulwark of security to shield men from those evils which the statute was intended to remedy. Whether this was a case within the statute, and requires that the promise should be in writing to support it, was a question of law: See the case of *Kent v. Hutchinson*, 3 Bos. & P. 232. The court are clearly of opinion that to

make the defendant responsible in this case, the promise should have been in writing; and no such evidence having been adduced on the trial, the presiding judge should have granted the nonsuit which was claimed.

It is the opinion of the court that the *postea* should be delivered to the defendant, with leave to enter up judgment of nonsuit in the case.

RICHARDSON, NOTT, and HUGER, JJ., concurred.

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The doctrine here laid down is approved in *Browne on the Statute of Frauds*, 190, 192, concerning which he says: "As to the liability of the person for whose benefit the promise is made, it was laid down by Mr. Justice Buller, in the case of *Matson v. Wharam*, 2 T. R. 80, that if he be himself liable at all, the promise of the defendant must be in writing. If this rule be understood as confined to cases where the third party and the defendant are liable in the same way, and to do the same thing, the one as principal and the other as surety, it may be accepted as the uniform doctrine of all the cases both in England and in our own country."

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## DEBESSE v. NAPIER.

[1 McCord, 108.]

**AGENT AS EXECUTOR DE SON TORT.**—An order drawn upon an agent in possession of funds out of which it is to be satisfied, when accepted, specially appropriates the funds for that purpose, and is a good assignment thereof, so that the funds do not become assets on the death of the drawer, and the agent cannot be held liable therefor as executor *de son tort*, when he satisfies such order out of the proceeds in his hands.

**ACTION** against executors *de son tort* under the following circumstances. The defendants, as auctioneers, had certain transactions to a considerable extent with Stephen Lacoste, and had sundry goods belonging to Lacoste, on which they had made advances. These goods consisted of wines and coffee, the value of which did not amount to the advances. A vessel called the *Two Brothers* arrived, and Lacoste placed her cargo in defendants' hands for sale. Lacoste was then indebted to the Union Insurance Company for money he had failed to pay over. He then drew an order in favor of the company as follows:

"Messrs. B. Napier & Co.—Gentlemen: Please pay to the order of Mr. John Stoney the net proceeds of sales of the cargo of the schooner *Two Brothers*, after deducting the balance due you, and oblige your obedient servant,

"STEPHEN LACOSTE."

This order was accepted by B. Napier & Co. Lacoste, at the time he drew this order was indebted to the plaintiff in the sum for which the present action was brought. Shortly after the date of the order and its acceptance, and before any part of the cargo was sold, Lacoste died. The defendants proceeded to sell all the property of Lacoste in their hands, and after taking out the amount of their advances, they paid over to the Union Insurance Company the balance in their hands. The plaintiff sought to hold them liable as executors *de son tort*.

Under instruction, the jury found for the plaintiff, and a motion was made for a new trial.

By Court, HUGER, J. Two questions arise in this case: 1. What was the import of the order drawn by Lacoste, on the defendant? and, 2. What effect had that order upon the rights of the parties subsequent to the death of Lacoste?

The defendants had advanced to Lacoste, on the coffee and wine, more than their value. Before however they were sold, and the balance ascertained, Lacoste placed in their hands, the cargo of the Two Brothers, for sale.

On the coffee and wine the defendants had a special lien for their advances, and only a general lien on the cargo of the Two Brothers. Before any of the property was sold, and consequently before any payments could have been carried to the credit of Lacoste, he drew an order on the defendant, which was accepted.

In this order they are directed to pay to Stoney, the net proceeds of the cargo of the Two Brothers, after deducting the balance due them. What balance? Nothing had been paid on account of the advance, for nothing had been sold, and therefore nothing but the anticipated proceeds of the coffee and wine could have been regarded as a payment, which when sold, did leave a balance of between three and four hundred dollars in favor of the defendants. If this was not the intention of Lacoste, balance has no meaning in the order. Such a construction however ought to be given, if the instrument be doubtful, *ut magis valeat quam periat*.

And this view is much strengthened by the fact, which though not stated in the brief, appears in the account, that the net proceeds of the cargo of the Two Brothers did not amount to the sums advanced to Lacoste. The proceeds of the cargo were equal to three thousand two hundred and forty-three dollars, and the advances to more than three thousand five hundred dollars. Lacoste therefore could not have intended that all the

advances made by the defendants should be paid out of the proceeds of the cargo of the Two Brothers, and the balance paid over to Stoney. It has been contended, however, that such was the understanding of the defendants; as they struck a balance in favor of Lacoste in their books prior to the sale of the wine. It appears, however, on examination of the books, that they did no more than carry to the credit of Lacoste the proceeds of the different sales as they occurred. It so happened, that the wines were sold last, and, consequently, the sums received by defendants prior to the sale, were more than equal to their advances to Lacoste.

This, however, cannot alter the case. It has not been shown how these books should have been kept, had the defendants supposed themselves required by the order to satisfy their advances out of the coffee and wine before they resorted to the proceeds of the cargo of the Two Brothers. Admitting, however, that such was their construction of the order, it does not follow that Stoney's rights are to be controlled by their construction. His rights, if any he have, must depend upon the legal import of the order. Nor was it in the power of the defendants, even if they were so disposed, to shift their lien from the coffee and wine to the cargo of the Two Brothers, to the injury of Stoney. They had made advances upon the credit of the coffee and wine, and were bound to exhaust that fund before they resorted to the cargo of the Two Brothers. Whenever a factor makes a special agreement for the payment of his advances, he is bound by it, and cannot depart from it, to the injury of third persons: Whitaker's Law of Lien, 108; 16 Ves. jun. 280. I am satisfied that Lacoste intended by his order that the defendants should retain no more of the proceeds of the cargo of the Two Brothers, than was sufficient with the proceeds of the coffee and wine to satisfy their advances, and to pay the balance to Stoney. The defendants, however, it is contended, were not authorized to comply with the order, although accepted before the death of Lacoste; as the cargo was not sold at his death, and were, therefore, assets subject to the order of his administrator. If the administrator was entitled to the cargo of the Two Brothers, or even to the balance of the proceeds after payment of the advances to defendants, they are responsible as executors of their own wrong, for having paid that balance to the assignees of Stoney. The smallest intermeddling with the assets is sufficient to constitute an executor of his own wrong: Toller, 37.



It is therefore necessary to determine if the cargo or the balance thereof be assets, and subject to the disposition of the administrator. The administrator is but the representative of the deceased. He has no power but such as his intestate possessed: Co. Lit. 207; 2 Bl. Com. 510. If, therefore, Lacoste had parted with the whole of his property in this cargo, and could not have exercised any further control over it, neither can his administrator, his representative.

If the order be regarded as a bill of exchange, on its acceptance, the defendants had a right to retain the cargo; and Lacoste, if alive, would have lost all right in it: Chitty on Bills, 41. If the order be regarded as a power of attorney given for a valuable consideration, it could not be revoked, and therefore all right in the cargo was transferred: 1 Bacon, 321, tit. Authority, E.

It is, however, essentially an assignment for valuable consideration, irrevocable in its nature, transferring all the property of Lacoste in the cargo of the Two Brothers to Stoney. In the case of *Peyton v. Hallet*, 1 Cai. 363, it was decided that an order drawn upon an agent not in possession of the fund out of which it was to be satisfied, when accepted, fixed the fund irrevocably, and was a good assignment. The same was ruled in the case of *Townsend v. Fenners*, 3 Johns. 83.

The case under consideration is much stronger than either of these referred to, inasmuch as the fund was in the hands of the defendants on whom the order was drawn. As the order was an absolute assignment of the proceeds of the cargo of the Two Brothers, irrevocable by the drawer, Lacoste, and as his administrator could possess no power which he did not himself possess, it follows that the proceeds of the cargo of the Two Brothers were not assets; and consequently the defendants did not make themselves executors of their own wrong by paying over the balance to the assignee of Stoney.

The motion in this case must therefore be granted.

NOTT, and RICHARDSON, JJ., concurred.

GARTT, J., dissented.

Justice COLCOCK, dissenting, delivered the following opinion:

In this case I differ in opinion with my brethren. I think if there be any difference between a contingent and a vested right, that the defendants are liable. It is said the case depends on this question: Had the defendants any goods of their intestate in their hands at his death? And if so, I think the case a very

clear one. At the time of his death the whole of the cargo of the Two Brothers, and the previous deposits of wine and coffee, were in their hands subject to their advances; but taken together greatly exceeding the amount of them. Now, whose property were the wines and coffee? It is admitted they were Lacoste's.

Then, as to the cargo of the Two Brothers, it is contended that the order operated as an assignment of it to John Stoney. That this cannot be the case may be proven in different ways: 1. It is paid at the death of Lacoste.

Stoney may have said to the defendants, the goods of the Two Brothers are mine, and I have taken possession of them. But this I humbly conceive could not have been.

1. Because the defendants had a general lien on the cargo of the Brothers, as well as the wines and coffee.

2. Because from the very words of the order, a lien was created on them. If so, surely Stoney could not have taken them out of their possession.

Again. Suppose the cargo of the Two Brothers had, after the death of Lacoste, been burnt, would Stoney have been the loser? Would he have been compelled by any court whatever to credit the demand which he had against Lacoste with what should have been proved to have been their value? I think upon such an event we should have heard him contending most strongly that the property was not transferred by the order. Is there anything in the law or mercantile usage which goes to show that property can be thus transferred? Is there any delivery, or that which amounts to a delivery? Is a delivery ever contemplated? The order say, pay the proceeds, after deducting your balance. Now, it appears to me inconsistent to say, pay a man the proceeds of his own property.

Again. Suppose that the wines and coffee should have been destroyed, or proved to be so inferior as to have brought little or nothing, can it be doubted that the defendant had a right to apply the proceeds of the Two Brothers to his own debt? I presume not. How does this comport with a property in Stoney? How does the word proceeds comport with the idea of a transfer of the thing itself? Much less can the idea of a transfer of the thing itself be comprehended, when the order means proceeds, if any. But what is the fact? The defendants did first sell the cargo of the Two Brothers, and did apply the money to the payment of their advances. The cargo was sold on the — day of —. The entry on the books on the — is to the credit of Lacoste. This is conclusive. It is an appropriation

of the money, and such an one as they had an undoubted right to make. As before observed, if the wines had been burnt the day after the sale of the cargo, the loss would not have fallen on the defendants.

It is the law that if one accepts a bill of exchange on the faith of goods to be consigned, and the drawer die before delivery, he may still sell the goods. Why? Because there the acceptor is bound to pay at all events.

And it is but reasonable he should have a lien on the goods. The advance is made directly on the faith of the goods. But in this case it is shown that there is no responsibility on the defendants, except in the event of a contingency, which he had the power to defeat, and according to the evidence of the case, did defeat. The case quoted by defendant's counsel from 1 Caines, *Peyton v. Hallet*, is much relied on, but is widely different from that before us. It is an order to pay money, which it is admitted is a transfer of the money itself. The case from Term Reports shows what is necessary to change the property itself. There, although the conveyance was absolute, and the money loaned on it, yet it was doubted, as the delivery had not taken place before the bankruptcy, the legal death, whether the property would pass. And so it will be found that all the other cases referred to are actual transfers of the property itself. If we had equity jurisdiction, perhaps we might say who should have the disposition of the funds, but we are called upon to decide the strict legal rights of the parties.

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## POOLE v. TOLLESON.

[1 McCORD, 199.]

**DEMAND AND NOTICE AFTER MATURITY.**—Where a note is indorsed after maturity, demand must be made of the maker, and notice of non-payment must be given to hold the indorser.

**ACTION** against the indorser of a promissory note indorsed after maturity. The holder demanded payment, but gave no notice of a refusal to the indorser. The plaintiff had judgment, whereupon a motion was made to set it aside, on the ground that notice should have been given to the indorser.

By Court, RICHARDSON, J. It has been already decided by this court, in the case of *Eifert v. Descoudres*, 1 Cons. 70, that in order to render the indorser liable, a demand of payment must be made upon the maker of the note, though indorsed after

it has become due. But the judges do not, in that case, say in so many words, that notice to the indorser, in case of a refusal to pay by the maker, is also indispensable, yet it seems implied that notice is necessary.

In the case of *Berry v. Robinson*, 2 Johns. 121, the judges of the supreme court of New York unanimously decided the same point, and in their opinion say: "The plaintiff was properly nonsuited for not proving demand of payment on the maker, and notice of his default to the indorser." But in that case, too, the want of notice was coupled with the want of a demand of payment upon the maker. No notice or demand of payment had been made in either of those cases, and I have found no adjudged case in which, as in the case before us, the want of notice was uncoupled with the want of demand of payment. In the case before us, there had been a demand and refusal, but no notice.

Thus we are without an express adjudication upon the precise point, yet the treatises upon bills of exchange and promissory notes make no distinction in this respect between notes indorsed before and after they become due. Thus Selwyn says, vol. i., p. 407: "Where a note, etc., is indorsed, etc., it is necessary, in an action against the indorser, to allege and prove a demand on the maker, and notice of his default," etc. And I believe all the books of acknowledged authority lay down the same general rule as established, and adjudicated cases seem to justify their general language: 5 T. R. 513; 1 Salk. 124; *Tobey v. Barber*, 5 Johns. 73 [4 Am. Dec. 326]; 6 T. R. 52, though they have not expressly decided it.

Chitty says, 151, if a bill be presented, and acceptance be refused, notice should be given as soon as possible to the persons to whom the holder means to resort for payment, or they will, in general, be totally discharged; for, in contemplation of law, the drawer has lost his effects in the hands of the drawee; and it is on that principle that notice of non-payment is required.

In the case of *Blesard v. First*, 5 Burr. 2670, it was decided that even where it is not necessary that the bill should be presented for acceptance before it became due, yet if it be presented, the holder must give immediate notice in case of non-acceptance: See also, *Goodall v. Dolly*, 1 T. R. 712, for the same point.

From the general rule, then, and the plain inference from adjudged cases too, it seems to follow that when in any case a demand of the drawee is required, then notice, if the bill has

been dishonored, seems to follow as a necessary consequence; and, as an indispensable one, before the drawer becomes fixed in his liability. If so, the case of *Eisert v. DesCoudres* has settled the question before us. If it be asked when notice is to be given, I can only answer that, in my individual judgment, immediate notice is as much required in such a case as in any other.

Not only simplicity and uniformity require that the same rule should prevail, but there is the same force of reason and necessity in the one case as the other, whether we argue from the letter, the allowed import of the contract, or from the consequences which may follow; for what is the note, when due, but an acknowledgment of so much in hand belonging to the payee? What is the indorsement but a bill to pay such amount to the indorsee upon demand? What is the implied assurance on the part of the indorser, but that so much money, subject to his disposition, is still in the hands of the maker, notwithstanding the time of payment is passed.

If notice of the non-payment upon the demand made by the indorsee be not received, what must the indorser conclude but that his money has been disposed of according to order; and if he be kept ignorant of the refusal to pay, may he not be put to the same hazard of loss, and is he not lulled into the same security as other drawers who receive no notice? Surely, he is in the same situation. The holder may suspect that he is not to trust to the maker's punctuality, but the indorser assures him he has still only to demand the money, and if the holder accepts the indorsement or bill, he is in the situation of other holders.

The error appears to me to arise from supposing the indorsement to mean that the maker is to pay according to the tenor of the note, which is impossible, because the time of payment is already past; whereas the meaning of the indorsement is to pay the amount acknowledged to be due when called for thereafter by the indorsee. In a word, the indorsement is as a new bill, and the holder looks at the note but to ascertain the amount, and to show that it has been already accepted.

It is as if a bill were upon a factor for all the money he has in hand; resort must be had to his books, or any acknowledgment by him to ascertain the amount due, but the bill itself is, in other respects, like every other bill which is payable on demand.

The motion is granted.

COLLOCK, and GANTT, JJ., concurred.

Justice JOHNSON: I dissent. I agree that notice was necessary, but with regard to the time at which it must be given, it may be done at any time before action was brought, and I think the acceptance of the service of the process authorized the presumption of notice.

Justice NOTT concurred with Justice JOHNSON.

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### SMITH v. McCALL.

[1 McCORD, 220.]

**IMPLIED WARRANTY AS TO QUALITY OF SLAVE.**—Although the rule has been adopted in South Carolina, following the civil law, that a sound price implies a warranty of soundness, yet the rule requires limitation, and cannot extend to the moral qualities of a slave.

**ASSUMPSIT** on a note given as part of the purchase-money of a negro slave. The defense was that the negro had an inveterate habit of running away, which so much impaired his value that the plaintiff was not entitled to recover more than had been paid. It appeared in evidence that the plaintiff had given a bill of sale warranting the title and soundness of the negro, but nothing more.

The plaintiff objected on the ground: 1. That the law does not imply any warranty of the moral qualities of a slave; 2. That where there is an express written warranty, no other or further warranty can be shown.

These objections were overruled, and the defendant had a verdict. A motion was made to set it aside.

*Gregg*, for the motion.

*Desaussure*, *contra*.

By Court, NOTT, J. The principle which has been so long established in this state, that a sound price implies a warranty of soundness of property, has been found in practice to open the field of litigation to such a boundless extent, that it seems to become our duty to endeavor to define its limits with some more precision than heretofore, and to set some bounds to the mischief which is likely to flow from it. This doctrine is said to have been derived from the civil law, and that as we have adopted a part, we must take the whole of the civil law relating to the subject. First it was applied to the physical soundness of the property, where there was no express covenant. Next it

was extended to cases where there was no express written warranty beyond the terms of such warranty. And now it is attempted not only to go beyond the express written warranty, but to extend it to the moral qualities also. That the principle adopted by our courts, that soundness of property shall be implied from the soundness of price, may not be theoretically, and perhaps morally correct, I am not prepared to say. But it has been found by experience to be too refined for practical purposes, and furnishes a pretext in every case of a bad bargain to set aside the contract, under a pretense of some defect in the property. I have no idea myself that the judges who first established the doctrine intended to introduce a rule of the civil law in opposition to the common law. I believe that it was then considered as a rule of common law. Wooddeson, in so many words, lays down the law to be so: Vol. II. p. 415. And other respectable authority may be found in its support: Powell on Con. 150.

It is conceded that selling for a sound price carries with it a warranty of title; and reasoning from analogy, one would perhaps conclude that soundness might as well be implied as title. By the common law a man may recover back money paid on a consideration which has failed: *Moses v. Macferlan*, 2 Burr. 1012; *Shone v. Webb*, 1 T. R. 732; *Stratton v. Rastalls*, 2 Id. 366. And where can the consideration be said to have failed, if it be not where a person has purchased property apparently sound, but which contains a secret defect undiscoverable by the most scrutinizing eye, which renders it entirely useless? It is admitted, that where one man gets the money of another into his hands, which, *equo et bono*, he ought not to retain, it may be recovered back in an action for money had and received; and where can the demands of equity and good conscience be more imperious than where a person has sold as sound a piece of property which is utterly unsound and worthless? So where the property is defective in part, the consideration has failed *pro tanto*, and the money may be recovered back. Every policy of the insurance is predicated on an implied warranty that the vessel is seaworthy, which is only another name for soundness.

In the case of *Parkinson v. Lee*, 2 East, 314, Justice Gross says: "That before the case in Douglas (by which I suppose he means the case of *Stewart and Wilkins*), it was a current opinion that a sound price given for a horse was tantamount to a warranty of soundness, but that when it came to be sifted, it was found to be so loose and unsatisfactory a ground of decision

that Lord Mansfield rejected it." It is also worthy of remark, that when the decision of *Stewart and Wilkins* was made, there was but little intercourse between that country and this. That decision was probably not known here for many years after it was made.

What is the conclusion, then, to be drawn from all these authorities? Not that the judges of this state have adopted the civil law in opposition to the common law; but that when the common law was unsettled and fluctuating, while the judges in England were sifting it on one side of the Atlantic, the judges in South Carolina were sifting it on the other, and they came to different conclusions on the same question. Indeed, it seems, owing to the high authority of Lord Mansfield alone, that the law was so settled in England. For if he had adopted the then prevailing opinion, the law would have been in England, at this day, the same as it is in this state.

I do not think, therefore, that the judges of this state are chargeable with a departure from the common law, although they have differed with the judges in England on a particular question. It is not the less a principle of the common law because it is conformable to the civil law also. Many of the principles of the civil law have been incorporated into and make a part of the common law. Indeed, the Roman codes have furnished a rich source, from whence many of the best principles of the common law have been derived.

But we can only adopt the civil law where it comports with the general principles of the common law, and then subject to the rules of the common law on the same subject. I feel authorized to conclude, therefore, that when the courts of this state established the rule that a sound price was tantamount to a warranty of soundness of property, it was as a rule of the common law and not of the civil law. And, lastly, the act of 1712 declares, that the common law shall be the law of this state. And it is not to be presumed that the judges would feel themselves authorized to adopt any other law, in opposition to the express letter and spirit of an act of the legislature.

Having differed with the English judges on the subject of implied warranties, imposes on us no obligation to carry the doctrine to the mischievous extent to which the civil law would carry us. We ought still to be governed by all the common law rules in relation to the subject, except so far as we are bound by the decisions of our own courts.

I do not mean to say I should have concurred in opinion



with the learned judges of that day. On the contrary, I think it is to be regretted that such a decision has ever taken place, for the reasons already expressed. But we have still the satisfaction to find the principle has never been extended to the moral qualities of a slave. That cases have passed *sub silentio*, where such a defense has been allowed, I have no doubt. From expressions used in some of these reported cases, it appears that the distinction has not always been observed, although the question is not directly involved in any of them. There does not appear to have been any direct decision on the point. The impossibility of fixing any scale by which the moral qualities can be graduated, is a conclusive reason why such a principle should not be allowed. The character of a slave depends so much upon the treatment he receives, the opportunities he has to commit crimes, and the temptation to which he is exposed, that we can form but a very imperfect opinion of it, abstracted from these considerations. A vice which would render him worthless in one situation, would scarcely impair his value in another. A habit that would render him useless to one man, would scarcely be considered a blot upon his character in the hands of another. If it should be extended to one fault, it must be to all, from the highest crime which a man is capable of committing, down to the smallest deviation from the strictest line of moral rectitude. Such a decision from this court, when publicly known, would be worse than opening Pandora's box upon the community. I am satisfied, therefore, that such a defense ought not to be allowed, except where it is supported by an express warranty or actual fraud.

It is unnecessary, therefore, so far as regards this particular case, to express any opinion on the other ground. Still, it may be well that it should not be passed over unnoticed. I have always considered it a settled rule of the common law that when a contract is reduced to writing, the parties are never presumed to have undertaken anything more than is contained in the writing itself. An express warranty, therefore, of any particular thing or quality would seem to exclude the idea of any other. And when a written warranty exists, an express parol warranty, varying from it, ought not to be admitted. In the case of *Munford v. McPherson*, 1 Johns. 414 [3 Am. Dec. 339], Chief Justice Kent asks emphatically: "Can a case be found where an action has been brought on a parol contract, made *in flatu* with a written contract?"

And Judge Thompson, who delivered the opinion of the court, says, "it cannot be a safe or salutary rule to let a contract rest partly in writing and partly in parol. Whenever it is reduced to writing, that is to be considered as evidence of the agreement, and everything resting in parol becomes thereby extinguished."

In the case of *Wells v. Shears*, decided in Charleston at the last term, this court did sustain an action brought on an implied warranty of soundness, where there was a bill of sale containing only a warranty of title. I then differed with the majority of the court in opinion; and I believe the decision was admitted to be contrary to the common law doctrine. But as a practice had long prevailed of allowing such actions, without regarding the distinction between cases where there was a written warranty and where there was none, it was thought that it would be dangerous to innovate upon it.

But that decision applies to cases of unsoundness only. Whenever we depart from a settled rule of the common law, I feel as if I were walking *per ignes suppositos cineri doloso*. We cannot foresee to what it will lead. Some unsuspected mischief lurking under a specious good is apt to spring up to bear witness of an error which it is too late to correct. The common law is the result of wisdom and experience, and ought not to be invaded without great caution and deliberation. In the present case, the court are unanimously of opinion the defense ought not to be allowed. And I hope this decision will close the door which was just unfolding a scene of litigation hitherto unknown in this country. I feel no disposition on my part to add to the accumulated weight of business under which we are already tottering; *Imponere Pelio Ossam, atque ossa frondosum involvere Olympum*.

The motion for a new trial must be granted.

COLCOCK, JOHNSON, RICHARDSON, and HUGER, JJ., concurred.

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In *Whitefield v. McLeod*, 1 Am Dec. 650, and *Vanderhoest v. McTaggart*, 2 Id. 667, we find the court attempting to modify and limit the rule, as it does here, that a sound price implies a warranty of soundness, as established in the early decision of *Timrod v. Schoolbred*, 1 Am. Dec. 620.

## HUDNALL v. TEASDALL.

[1 McCord, 227.]

**VOLUNTARY DEED, WHEN INDEBTED.**—A deed is not necessarily void against a subsequent purchaser, merely because it is voluntary and the person making it is indebted to some extent at the time.

**POSSESSION AS EVIDENCE OF FRAUD.**—Where personal property is conveyed by a husband to a trustee for the benefit of his wife and children, the subsequent possession of the husband is consistent with the object of the deed, and is no evidence of fraud in behalf of a subsequent purchaser.

**TROVER** for a negro, who, with certain other property, had been conveyed in the year 1819, by Luke Norris, to the plaintiff in this action, in trust for the wife and children of the said Norris, in whose possession it was for several years, and at the time the negro was levied on for a debt previous to the execution of the deed. The plaintiff appeared and forbade the sale, but the negro was sold and purchased by the plaintiff. The debt for which he was sold amounted only to twenty dollars; the balance beyond this was not actually paid to the sheriff, but a receipt was given to him by Luke Norris for the protection of Hudnal, the trustee. The negro went back into the possession of Norris, and continued there until the year 1817, when he sold him to the defendant. It appeared that before the defendant purchased, he had notice of the plaintiff's claim to the negro. When the defendant obtained his bill of sale, he took a witness and called upon the plaintiff to inquire if he had any claim to the negro; the plaintiff admitted he had a claim, but afterwards he denied it. However, shortly after the defendant got the negro into his possession the plaintiff made a demand for him, and then brought this action.

The indebtedness of Norris at the time the negro was conveyed to Hudnal was not above fifty dollars, which had been since paid.

The jury found for the defendant, and a motion for a new trial was made on the ground that the verdict was contrary to law and evidence.

*Waties*, for the motion.

*Desaussure*, *contra*.

By Court, Norr, J. In considering this case, I deem it unnecessary to notice the statutes 18 and 27 Eliz., on the subject of fraudulent conveyances. I believe if those statutes, together with all that has been said, and all that has been written upon

them, were blotted from our law books, the loss would hardly be felt. They may indeed have embodied and given precision to certain principles of the common law, which it would have taken a longer time to have effected by the decisions of the courts. But they contain nothing more than those plain principles of common honesty, which have long since been recognized as forming a constituent part of the common law on the same subject. That a voluntary deed, the tendency of which is to defeat the rights of existing creditors, should be considered fraudulent and void, there can be no doubt. And that one, the object of which is to defraud subsequent creditors, may be considered equally so, I believe, is equally unquestionable.

But to declare a deed, embracing lands and negroes void, merely because the party making it happened to owe a few inconsiderable debts, not exceeding fifty dollars, and which have been paid since, would be an entire misapplication of the rule. In any view, however, this defendant is not entitled to the benefit of the principle, because he is not a creditor.

He has, indeed, paid his money; but he has received the property as an equivalent. And until it is taken from him, the relation of debtor and creditor cannot subsist between the parties. If the claim of the plaintiff had depended altogether on the bill of sale from the sheriff, the circumstance of his having permitted it to remain in the possession of Norris for such a number of years, would undoubtedly have been such an evidence of fraud as would have defeated it. But when we view him in the character of a trustee, and consider him as purchasing in that capacity for the purpose of preserving the trust confided to him, it gives a different complexion to the transaction.

The possession of the husband was the possession of the wife and children, and the possession and use of it for their benefit, was consistent with the object and provisions of the deed.

The last, I think, is the most substantial ground of defense on which the defendant has relied, and even that cannot avail him on this occasion.

Admitting that a *bona fide* purchaser from a trustee, not having the notice of the trust, would be protected, the present defendant would derive no support from the admission, for he did not purchase from the trustee. It is contended, however, that the declaration of the trustee that he had no right went to establish the sale which Norris had made. But when we come to analyze that testimony, it is too unsatisfactory to be entitled to confidence. According to the witness he at first said he had

a claim to the property, the next moment he said he had none, and the first step he took afterwards was to bring an action to recover the value of it. The only method by which this seeming inconsistencies can be reconciled is (if he had made any such declaration), to suppose he said what was true, that he had no personal interest in the property.

The court would not readily give such a construction to the testimony as would make the trustee guilty of a palpable fraud, without any apparent interest, and which would go to defeat the interest of the *cestui que trust*. But suppose the testimony to be literally true, the false affirmation was made after the bargain was concluded, and therefore could have had no influence upon it. It is said that the defendant had then been correctly informed, he might have got his money back. But that is a mere speculative opinion, which the court cannot regard. He might, however, have avoided the difficulty, had he made the inquiry beforehand. He was apprised of the plaintiff's claim, he nevertheless chose to purchase first, and set about the inquiry afterwards. I think the effect of the notice which was given him previous to the purchase, was not sufficiently impressed upon the minds of the jury.

Where an act of the legislature declares an unrecorded deed absolutely void, the court will not give it effect against a subsequent deed, unless the purchaser has actual and explicit notice: *Tart v. Crawford*, during this term. But there is no act declaring unrecorded deeds of this description void. Such notice, therefore, as would enable him, with ordinary diligence, to ascertain the fact, and particularly when it was so completely within his reach, ought to be deemed sufficient. In addition to the notice given him by the witness, the deed was actually recorded in the register's office of the district where the defendant's deed was also recorded. And although there is no law requiring it to be so recorded, yet it was calculated to give it publicity, and strengthens the evidence before given, that he must have known of its existence.

The fact also of his calling upon the plaintiff immediately after his purchase, is conclusive of the fact.

I am satisfied, therefore, that a new trial ought to be granted.

**RICHARDSON, HUGER, and JOHNSON, JJ., concurred.**

## SMITH v. VANDERHOST.

[1 McCord, 322.]

**INTEREST AS DAMAGES BEYOND PENALTY.**—In an action of debt upon a judgment for the amount of the penalty in a bond, the plaintiff may recover interest by way of damages beyond the penalty of the bond upon which the judgment was founded.

**DEBT** on a judgment given for the amount of the penalty in a bond. It was claimed that the plaintiffs were entitled to recover not only the amount of the penalty with the costs of the former suit, and for which the original judgment had been rendered, but also interest thereon by way of damages for the interest that had accumulated beyond the amount of the penalty since the date of the judgment.

Judgment was given against the plaintiffs; and a motion was made for a new trial. The opinion of the court on the point here noticed is only given.

By Court, GANTT, J. I think, too, that the plaintiffs were entitled to recover interest by way of damages beyond the amount for which the original judgment had been rendered. If damages are allowed on the ground that the debt has been detained, then, in reason, there can be no distinction between cases where those damages exceed, and where they do not exceed, the penalty; it appears as forcible in the one case as in the other. It may be presumed that an obligee would rarely suffer a bond to remain unpaid so long as that the interest would exceed the penalty. The judgment in an action of debt on bond is to be rendered for the penalty. It is the stipulated forfeiture for the non-performance of the condition, and the obligee being a party to the contract, has no reason to complain if, by his neglect to enforce payment, the interest should exceed the penalty.

But when a judgment has been recovered in an action on the bond, the nature of the demand is altered; the judgment is rendered for a fixed sum, to wit: the penalty; the obligor has it in his power, at all times, to discharge the debt before it reaches the amount of the penal sum; but if he fails to do so till the interest amounts thereto, the sum for which the judgment was rendered becomes the actual debt due, and if payment is longer delayed to the injury of the plaintiff, he is entitled to interest by way of damages for the detention. The judgment rendered fixes the amount of debt due. There is no longer

any penalty. The bond debt has become merged in another and higher security, and constitutes a new debt; and such is the opinion expressed by Lord Kenyon, in the case of *McClure v. Dunkin*, 1 East, 486, who said: "If this had been an action on the bond, the objection would have holden good; but after the judgment recorded, *transit in rem judicatum*, the nature of the demand is altered; and this being an action on the judgment, it was competent to the jury to allow interest to the amount of what was due:" See, also, Buller, 174.

I think both grounds have been ably and fully supported by the counsel for the plaintiffs, and that a new trial should be granted.

NOTT, JOHNSON, HUGER, and COLOOCK, JJ., concurred.

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This case is instructive taken in connection with the note to *Graham v. Dickson*, 1 Am. Dec. 328.

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## MOTTE v. DORRELL.

[1 McCORD, 380.]

**AGREEMENT TO PAY FOR RENEWAL, USURIOUS.**—A person gave a note for five hundred dollars, for a valuable consideration, payable in sixty days, and when it fell due, to obtain a further time of sixty days, he gave his due bill for fifty dollars, and a renewed note for five hundred dollars, payable sixty days after date. The transaction was held usurious, and the note for five hundred dollars, as well as that for fifty dollars was void.

**ASSUMPSIT** brought by the holder of a note of hand against the indorser. The note was drawn by one White at sixty days, for five hundred dollars, in favor of the defendant, and indorsed to the plaintiff. The defendant set up usury. The note was given in renewal of a former note for the same sum of five hundred dollars, held by the plaintiff, who, when he consented to the renewal required fifty dollars for his forbearance for sixty days, which was accordingly agreed to, and a due bill was given the plaintiff for the fifty dollars.

Under instruction the jury found for the defendant. A motion was made for a new trial on the ground of misdirection.

By Court, BAX, J. I have again given this case the best consideration in my power since the argument, and from a review of the law authorities upon the subject I am of opinion that there are no grounds for setting aside this verdict.

One uniform principle seems to run through the whole of them, namely, that where the original contract is not usurious, it shall never be made so by matter, *ex post facto*: Buls. 17; 7 Bac. tit. Usury, 200; also, Ord on Usury, 100 and 101; 1 Wm. Black. 462; as where a man lends money on a legal interest, and after a subsequent agreement is made for more interest, which is usury, that will not avoid the first contract, per Holt, Chief Justice: 7 Bac. 200; Ord on Usury, 100; 1 Saund. 294; Cro. Eliz. 20.

But where there be a corrupt agreement at the time of making the contract, or lending the money, then the bonds and all assurances are void: 1 Mod. 69. So in like manner in 2 Mod. 307, it is laid down that to avoid a security, by reason of usury, the contract itself must be usurious to make it void. And in Hawk. P. C. ch. 82 and 21, it is laid down that it is not material whether the payment both of principal and the usurious interest be secured by the same or different conveyances; but all writings whatever for strengthening such a contract are void: 7 Bac. 200.

Now, to apply the circumstances of this case to their legal principles, there can be no doubt, as I mentioned in my charge to the jury, that if the plaintiff had retained the first note in his hands, which was fair and good when drawn, and at the time it became due had taken this premium due bill, or any other instrument for forbearance for sixty days longer, which was more than seven per cent. for the use of the five hundred dollars for that time, such due bill or instrument only would have been usurious, while the original note would have remained unimpeached in the hands of the holder.

But here the original contract was rescinded, and a new one entered into (for I like every renewal of a note to be a new contract), and at the time when this new contract was made this fifty-dollar premium note was given for the forbearance of the payment for sixty days; and although it is made payable by a separate instrument made *eo instanti*, it must be considered as a part of the said new contract, which makes the whole usurious.

I am therefore of opinion that the rule for a new trial should be discharged.

COLCOCK, NOTT, HUGER, and GANTT, JJ., concurred.



## CANNON v. BEGGS.

[1 McCord, 379.]

**INTEREST FROM DEMAND.**—A note was expressed: "Due T. N. on demand, three hundred and ten dollars," etc. It was held that interest should be reckoned only from the time of demand.

**ASSUMPT** on a note in the following words: "Due Thomas Newman, Esq., on demand three hundred and ten dollars, first November, 1810," signed by the defendant, and indorsed to the plaintiff. On this note there was credited one hundred and nine dollars and fifty cents, paid fifth December, 1815. The question was as to when interest should commence. The judge instructed the jury that interest should commence only from the time of a demand made, of which the only evidence was the payment on the note, from which it may be inferred or presumed a demand was made; and the jury so found.

Motion was made for a new trial.

By Court, COLLOCK, J. There being a difference of opinion on this subject, I have been led to investigate it with some diligence, and the result is, that I am confirmed in the opinion given below, that the plaintiff is entitled to interest only from the time of the demand. Mr. Chitty, in his Treatise on Bills, speaking of interest, says: "When interest is made payable by the bill, etc., itself, there is no doubt of its being recoverable; and, according to several cases, is, in general, payable on all liquidated sums, from the instant the principal is due, it is recoverable on all bills of exchange and notes of hand, payable at a day certain or after demand." If payable on demand, 6 Mod. 138; 5 Ves. jun. 803, in some cases, it is said that "interest is payable from the date of the note," etc. He then observes, "and it is generally understood that a bill or note carries interest only from the time of the demand of payment, unless the delay were occasioned by the defendant; as his being out of the kingdom at the time it was due;" and then follows the reason on which the doctrine is founded; "for interest being in the nature of damages for non-payment, it would be unreasonable to suffer the holder, by his own laches, to acquire a benefit, and to subject the drawer, acceptor, or indorser to damages, when he was guilty of no default:" Chitty, 295, 318; and for these positions, refers to high authority, which, upon examination, will be found to support them. In 7 T. R. 124, *Tarquar v. Morris*, in a case on a bond in which no time of payment

was mentioned, and no interest required, the court said the debt is due at the date, and interest must be calculated from that time. The first position is also to be found in the case of *Thompson v. Ketcham*, 8 Johns. 189, 192 [5 Am. Dec. 332]; but these were not cases payable on demand. Nothing was said as to any time or place of payment, and in speaking of liquidated demands drawing interest, the same thing is meant.

Where two sit down to adjust an account, and strike a balance and it is done, and the balance acknowledged without saying anything about payment, the debt is due immediately, and interest allowed from the time. In 2 Black. 761, *Blaus v. Henricks*, which was a case on an account stated, it was decided that interest from the date be allowed; and in that case, Plowden, Blackstone and Nares say interest is due on all liquidated sums from the instant the principal becomes due and payable; therefore, on all bills of exchange, notes of hand payable at a certain day, or after demand, if payable on demand, interest is due. So, also, in the case of *Brass Croseley v. Lord Mayor of London*, 3 Wilson, 206, it is there apparent that a note payable on demand is not considered as carrying interest from the date, and is distinguished from cases where no time is mentioned.

But it is contended that it should carry interest from the date, because it is a debt due *in presenti*, the *solvendum in futuro*. I ask if this is not equally the case with every note of hand in which the maker says, I promise to pay, one year after date, for value received? Is not this as much an acknowledgment of a debt immediately due? There is a promise to pay, and an acknowledgment of value received. The debt then exists at the date of the note. But in such case interest is allowed only from the time the note is payable. Why not apply the same principle to the due bill, which is also payable at a future time, viz., on demand?

Is it now a bill of exchange? Here the note was immediately transferred by Newman to Cannon; it was a draft on himself, payable on demand. Had it been on his banker, there could have been a doubt that interest would have been allowed until the demand. Why? Because it is said the drawee undertakes to demand. So in this case I say the payee, by the terms of the contract on the due bill, undertakes to make the demand.

RICHARDSON, GANTT, and BAY, JJ., concurred.

## DUNCAN v. BROWN.

[1 McCord, 375.]

**DEBTS NOT DISCHARGED BY INSOLVENT ACT.**—Where a defendant had been discharged under the insolvent act from confinement, at the suit of the plaintiff, it was held, that the act did not prohibit the plaintiff suing the defendant: 1. For debts which had been paid by the plaintiff as the defendant's indorser since his discharge, but which notes were in existence at the time of such discharge; and, 2. For debts due by the defendant to the plaintiff before the arrest and discharge, but which had not been sued on, nor on which any dividend had been received; that the law operates a discharge only as to such suits that are pending, or on the debts of those creditors (whether suing or not) who may think proper to receive a dividend.

**MOTION** to discharge the defendant from bail, on the ground that he had been discharged under the insolvent act from confinement, at the suit of the present plaintiff, and therefore should not be again liable to be sued by the same plaintiff. There were two classes of debts for which the plaintiff now sued the defendant: 1. Debts which had been paid by the plaintiff as the defendant's indorser since his discharge, but which notes were in existence at the time of his discharge; 2. Debts due by the defendant directly to the plaintiff, but not sued for.

By Court, COLCOCK, J. As to the first description of debts I entertain no doubt. The defendant is not discharged from such by having taken the benefit of the act; for as to them the plaintiff cannot be said to have been a creditor at the time of the arrest or discharge, and he is not therefore embraced or even contemplated in any part of the act. The case of *Wall v. The Court of Wardens*, 1 Bay, 434, at first created some doubt in my mind; but a more attentive reading satisfied me that the case would not be considered as embracing the question now before me; and I am of opinion that the plaintiff is not prevented from suing on a note due before the arrest and discharge, which had not been sued on, or on which no dividend has been received. That the law operates a discharge only as to such suits as are pending, or on the debts of those creditors (whether suing or not) who may think proper to receive a dividend.

The act, it is true, as said in the case above referred to, does contemplate three descriptions of persons: 1. Suitors, or suing creditors; 2. Those coming in and accepting of a dividend of the insolvent debtor's estate and effects; and, 3. Those who had neither chosen to have or accept a dividend.

But the first description of persons may be comprehended in the second and third. Thus, a suitor may or may not accept a dividend, and there is nothing in the act to compel him to do so, even on the demand for which he sues; or a suitor may not be a suitor as to some demands.

What is the object of the act? The title shows it to be, to relieve unfortunate debtors from imprisonment. It is not a bankrupt act, except so far as the creditors may choose to make it one. It declares that one imprisoned may be discharged on certain terms, by giving in a just schedule of all his property, and taking the oath prescribed. It then proceeds to the manner in which the property is to be disposed of, and the manner and extent of the discharge of the insolvent.

1. It directs that the property shall be assigned by a short indorsement on the petition to the "creditor or creditors, at whose suit he is charged, or to such person as the court shall direct; and that the assignment, to be made as aforesaid, shall be in trust for such suitor or suitors, and such other the creditors of the said petitioner as shall be willing to receive a dividend of his real estate, goods and effects; and shall within twelve months after the time of exhibiting their petition make their demand."

This being done, and the petitioner delivering up all his vouchers and title deeds to the assignee, he "shall be forthwith discharged by order of the court aforesaid from such suit or suits; and also, thenceforth, be acquitted and discharged of and from and against all such other of his or her creditors as shall have received their dividend aforesaid, from all debts, contracts and demands whatsoever."

The first inquiry, in giving construction to this clause is, to whom is the assignment to be made—to the creditor or creditors? But there is no obligation on them to accept, or on the court to appoint them, for the act says, to them "or such other person." Nothing is to be collected then from the fact that they may be assignees. Next, for whose benefit is the assignment to be made? For the benefit of those who shall be willing to receive a dividend of his estate, whether suing creditors or not suing creditors; for according to all rules of construction, the words, "willing to receive," refer as well to suitor or suitors, as to other creditors who may take a dividend. When the act speaks of his discharge, it first simply discharges him from the suit or suits which may be pending. The words are certainly not sufficient to comprehend all the demands which a suing creditor may have.

Can it be said that a specification of particular debts means all debts? When the legislature intend to discharge the insolvent from all debts which he owes to any particular description of creditors, it may do so in express terms; as in the latter part of this clause, in which he is discharged from the debts of those who take dividends, the words are: "He is acquitted and discharged from all creditors who take a dividend." Of what? Of all debts, contracts, and demands, whatsoever. It is, then, manifest that he is not discharged from any debts not sued for, and the eleventh clause of the act confirms this construction; for there, all creditors, who do not receive a dividend, are allowed to perpetuate their demands in a particular manner. And I would ask, what reason can be given why a person who has sued on one out of twenty debts, should be compelled to take a dividend for the nineteen debts not sued for, any more than one who has a single debt against the insolvent, for which he has not sued. The arguments which go to show that the relief afforded by this act is only partial, would be well addressed to the legislature, but can have no effect on the court. Our duty is to say what they have done, and not what they ought to do; and I am happy to be relieved from that which has been found by all who ever engaged in it, the most difficult subject of legislation.

The majority of the court concur in this opinion. The motion is therefore dismissed.

NOTT, HUGER, and RICHARDSON, JJ., concurred.

GANTT, J., dissented.

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### COSACK v. DESCODRES.

[1 McCORD, 435.]

**MEMORANDUM FOR SALE OF LAND.**—On the sale of land the following receipt was held sufficient as a memorandum within the statute of frauds: "Received of C., twenty dollars, being on account of a plantation on the Cypress, sold to him this day for two thousand two hundred dollars, payable in different installments, as per agreement."

**ACTION** on the case for the breach of the following agreement: "Received of Mr. Peter Cosack, twenty dollars, being on account of a plantation on the Cypress, sold to him this day, for two thousand two hundred dollars, payable in different installments, as per agreement. Charleston, August 1, 1816.

" \$20.

DESCODRES & CROVAT."

The jury found a verdict of three hundred dollars, and for twenty dollars more, with interest upon the latter sum, from the date of the agreement.

*King*, for the motion for a new trial.

*Cogdell*, *contra*.

By Court, RICHARDSON, J. That the defendants contracted to sell to the plaintiff a tract of land for two thousand two hundred dollars, and that they received twenty dollars in part payment, are unquestionable facts. That the plaintiff very soon after, demanded titles, after tendering the first installment, or at least was offering to tender the money, when he was stopped by Crovat's expressly refusing to make titles, are equally certain. The plaintiff having offered to perform his part of the contract, and the defendants refusing to do the like on their part, gives a right of action; provided, the contract was originally binding in law.

The objection to the contract is, that it is not according to the statute of frauds, etc., 29 Charles II., c. 3, pl. 82, in not having been reduced to writing, etc. This statute enacts "that no action shall be brought, etc., upon any contract or sale of land, etc., unless the agreement, etc., or some memorandum or note, etc., shall be in writing, and signed by the party so charged therewith, or some other person thereunto by him lawfully authorized."

In the case before us, the receipt was an intelligible note in writing, and signed by the defendants. It imports the assent of both parties, both in its terms and by the acts set forth, which is what the statute requires. It is enough that the writing signed by one, imports an agreement and has been accepted by the other. It need not be signed by both: 1 Ves. jun. 326; Roberts, 109. This is indeed well illustrated by an ordinary meane conveyance, which is signed but by the donor. No particular form is required by the statute: 2 Ventr. 361; 1 Vern. 110; Peake, 217. It is enough if intelligible. I apprehend that there can be no question that in such a case the court of equity would specifically enforce the contract: 3 Taunt. 175; 3 Wooddeson, 468; 1 Ves. jun. 326. And where that court ought to give specific relief, this court, under the same testimony, will give damages; for though the courts differ in the mode of proof, and in the matter of giving relief to the injured party, yet in a question of right, and for the enforcement of law, which is the end of both courts, they agree.

But besides the receipt in writing, it appears well settled that the payment of a substantial part of the purchase-money is such a part performance as to take a case out of the statute: *Roberts*, 153: 1 Vern. 472; 3 Atk. 4; Ves. 82; 4 Ves. jun. 720. Now upon this point the receipt is plain: "Received on account of a plantation," etc., sold to him for two thousand two hundred dollars. The twenty dollars, by the literal import of the receipt itself, is plainly a payment.

I need not notice at large the objections to the verdict arising out of the facts in evidence. The plaintiff's case was very well made out. Justice is on his side, as the defendants had willfully broken their contract, and that too, most evidently for gain. In such a case, seeing that the plaintiff's claim was legal, the jury must have given very heavy damages before a new trial would be granted. But they appear to have taken as a measure of damages, the probable gain to the defendants arising from their breach of the contract, which is a rational measure of the amount of the loss to the plaintiff from the same cause.

The motion is therefore refused.

JOHNSON, and HUGER, JJ., concurred.

GAMT, J., dissented.

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## BARELLI v. BROWN.

[1 McCORD, 449.]

**PAYMENT BY NOTE.**—The liquidation of an account by a note, though by a note of a third person, unless expressly received in payment, does not discharge the open account.

**INTEREST ON BALANCE.**—It is well settled that interest should be allowed on an acknowledged balance, due on an open account.

**INTEREST ON LIQUIDATED DAMAGES.**—Interest may be recovered upon account for money had and received, and in all cases of certain or liquidated damages.

**ACTION** for certain money, the proceeds of a sale of goods placed in the hands of the defendants for sale. One count stated that the plaintiffs, Barelli, Torre & Co., placed certain goods in possession of the defendants, Brown & Moses, public auctioneers, for sale, and that the defendants, having sold the same, owed the plaintiffs a balance of one thousand eight hundred and sixty-six dollars and eighty-six cents on the twenty-seventh of April, 1819, and refused to account for, or pay over the same. A second count was for money lent and advanced, and also money had and received by Brown & Moses, as auc-

tioneers. The jury found for the plaintiffs a verdict of one thousand two hundred and sixty-six dollars, with interest.

A motion for a new trial was made, principally on the following grounds noticed in the opinion: 1. That a note of a third party, given for the balance, was a payment; 2. And interest ought not to be allowed on the balance.

By Court, RICHARDSON, J. [after reviewing some preliminary objections]: The fifth, sixth and ninth grounds appear to be predicated upon the supposition that, as Moses gave his notes to the plaintiffs for the balance acknowledged to be due, neither of the defendants, but more especially Brown, could be made liable upon the account acknowledged. But it is settled that the liquidation of an account by note, though it should have been by the note of a third person, unless expressly received in payment, does not destroy the open account: 5 Johns 72-73; [*Tobey v. Barber*, 4 Am. Dec. 326]; 8 Johns. 389.

The plaintiffs were then at liberty to sue Moses upon his notes, or both the defendants upon the original account. And as to the note of one thousand and one hundred dollars, given for Lazarus, either of the defendants was at liberty to regard the consideration of that note as a part of the general account of the plaintiffs, and to strike the balance as if no such note existed. The result is precisely the same, whether the note of one thousand and one hundred dollars be charged to the defendants, or the amount of goods, *i. e.*, one thousand and one hundred dollars, which was the consideration of the note.

The parties might adopt either form in order to show the true balance due, and Moses having adopted the latter, his act is binding upon Brown. I mean not to say, that the manner of casting the account made the note of one thousand one hundred dollars a vendue debt, if not of that character before. I repeat, that for the present the inquiry is, was the account proved, not whether it originated in a vendue transaction, nor whether the acknowledgment by Moses made it so. The seventh and eighth grounds of the brief remain to be considered.

1. Was the declaration in due form? The second count was "for money had and received," and the account filed was for divers sums of money received by the defendants for the plaintiffs, upon which a balance was due and had been expressly acknowledged. Could there then be a case more peculiarly proper for such a count, which Chitty, page 341, says, is the proper form where money has been received, or which, *ex aquo et bono*, ought to be paid over to the plaintiffs.



Lastly, ought interest to have been allowed upon the balance due, and in this form of action? Interest has been too often allowed upon a balance of accounts, after it has been acknowledged, to be now disputed: *Robinson v. Bland*, 2 Burr. 1086; 2 Pars. 662; *Blaney v. Hendricks*, 3 Wils. 205; 2 Black. 761; 1 Doug. 376; see the collection of cases, by Day, in 5 Esp. 114.

In the case of *Bulow v. Goddard*, 1 Nott & McCord, 45 [9 Am. Dec. 663], this court considered the subject with great attention, reviewing past adjudications in detail, and appear to have come to this conclusion: "That interest is recoverable in all cases of certain or liquidated damages." The same case also decides that interest may be recovered upon a count for money had and received: See, also, *Pean v. Barber*, 3 Caines, 266; 9 Johns. 71 [*People v. Gasherie*, 6 Am. Dec. 263]; Lawes' Pl. 488.

The motion is therefore dismissed.

COLCOCK, HUGER, and GANTT, JJ., concurred.

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For a consideration of the subject of interest, see note to *Selleck v. French*, 6 Am. Dec. 185.

The principal case has since been followed in South Carolina in *Dogan v. Ashbey*, 1 Rich. 36; *Townsend v. Stevenson*, 4 Id. 59; *Thomas v. Kelley*, 3 Rich. N. S. 210. The doctrine held by the courts in South Carolina, regarding a payment by note, is stated in *Thomas v. Kelley*, where the court say: "The authorities in this state are to the effect that a note taken does not amount to satisfaction, unless it is so agreed and understood by the parties; and unless such be the understanding, it is rather to be regarded as a memorandum or acknowledgment of the amount ascertained to be due: *Barelli v. Brown*, 1 McCord, 449; *Costello v. Cave*, 2 Hill, 528; *Kelsey v. Holsted*, 2 Rich. 244; *Bank v. Bobo*, 9 Rich. 318; *Hest v. Fraser*, 2 Strob. Eq. 250." This is the general rule, except in the states of Massachusetts, Maine, and Vermont: See note to *Pateshall v. Apthorp*, 1 Am. Dec. 3; *Johnson v. Weed*, 6 Am. Dec. 279; *Whitbeck v. Van Ness*, Id. 383; *Thacher v. Dinwiddie*, 4 Am. Dec. 61; *Manely v. McGee*, Id. 105; *Tobey v. Barber*, Id. 323.

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## NEWSON v. AXON.

[1 McCord, 509.]

**ORDINARY CARE BY INNKEEPER — QUESTION OF FACT.** — An innkeeper is liable for all losses which might have been prevented by ordinary care; and ordinary care is a question for a jury. The burden is upon the innkeeper to show such ordinary care.

**LIABILITY FOR HORSE IN STABLE.** — Where the horse of a guest was put into a stable which was very open, but which had a bar to one door, and a lock and key to the other, although the key was delivered to the servant of the guest, yet the innkeeper is liable for a horse stolen out of the stable.

**ACTION** to recover the value of a horse stolen from the stable of the defendant, an innkeeper. The plaintiff, a traveler, stopped at the house of the defendant, with three horses and two servants. The horses were put into a stable, which was very open, although there was a bar to one door, and a good lock and key to the other. The hostler wished at the usual hour of the evening to lock the stable door, and carry the key into the house, but the servants of the plaintiff made objection, saying they would sleep in the stable, and did not wish to be locked in. It did not appear whether the door had been locked, or how the stable was entered, but the next morning it was discovered that one of the horses was stolen. A verdict was found for the plaintiff. Motion was now made for a new trial.

*Evans*, for the motion.

*McCord*, contra.

By Court, **HUGES, J.** Public utility requires that innkeepers be held liable for all losses which might have been prevented by ordinary care. Ordinary neglect is but the want or absence of ordinary care: *Law of Bailments*, 24. Whenever ordinary care was used by the innkeeper, was a question for the jury; and unless they have found very much against the weight of evidence, their verdict is not to be disputed. It is the duty of innkeepers to provide good and sufficient stable, and if they do not, they are responsible for the consequences. How far the loss in question was to be attributed to the badness of the stable, does not appear; but as it may be attributed to that cause with as much propriety as to any other, the defendant has no reason to complain that he is made responsible. It was a want of ordinary care to have such a stable. Whenever it be doubtful whether ordinary care has been used or not, the presumption is against the bailee. If he does not rebut the presumption of a want of ordinary care, arising from the loss of the goods bailed, he is responsible. It has been held that when the goods of the guest were placed in a chamber, and the key delivered to him, that the innkeeper was nevertheless responsible for their loss: *Moor*, 78, 158; *Cro. Eliz.* 285; *Salk.* 18. Had, therefore, the stable been properly constructed, and the key delivered to the servants of the plaintiff, the defendant must have been held responsible. The innkeeper is regarded as exercising a public employment, all the duties of which must

be rigidly enforced, to prevent the numerous frauds which they might have it in their power to practice with impunity.

The motion must therefore be discharged.

COLCOCK, NOTT, RICHARDSON, and GANTT, JJ., concurred.

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The liability of an innkeeper is discussed in a note to *Clute v. Wiggins*, 7 Am. Dec. 448.

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## STATE v. ALLEN.

[1 McCord, 226.]

**RIGHT OF POLLING JURY.**—A defendant has not a right, either in a criminal or civil case to have the jury polled; this is a means which the court sometimes takes for its own guidance, but when the court is fully satisfied, it will not resort to it.

**FUNCTION OF JURY IN PROSECUTION FOR LIBEL.**—In prosecutions for libel, the intention with which the publication was made, as well as the fact of publication and the truth of the innuendoes, are involved in the general issue, and the whole case, law and fact, is determined by a general verdict.

**INDICTMENT for libel.** After the jury had been sworn to try the case the defendant's counsel moved to quash the indictment on the ground that the prosecutor had been one of the grand jury, who found the bill. On inquiry, it was found that, although the prosecutor had been one of the grand jury in the fall term of 1820, he was not one when the bill was found, and therefore the motion was overruled.

The jury were instructed that the only questions for them to find was the fact of publication, and whether the innuendoes were true. They found the defendant guilty. The defendant asked to have the jury polled, which the court refused.

A motion was made for a new trial because of misdirection, and because of the refusal to have the jury polled.

*Nott*, for the motion.

*Clarke*, contra.

By Court, HUGER, J. The motion to quash the indictment must be dismissed for reasons assigned by the circuit court.

Before I proceed to consider the first and important ground on which the motion for a new trial is submitted, I will briefly observe on the second, that in the case of *Martin v. Maverick*, 1 McCord, 24, recently decided by this court; it was ruled that the right of polling the jury did not attach to either party, plaintiff or defendant; that it was a means to which the court

sometimes resorted to ascertain if the jury were agreed on their verdict, but that when fully satisfied of this fact by other and more accustomed means it would not be resorted to.

The first ground presents a question which formerly excited much interest in England, but one which I had thought long since settled in this state. I find, however, on investigation, that no decision directly on the point has been made by this court, however uniform may have been the decisions on the circuit. I shall therefore proceed to inquire: 1. Whether, according to the common law of England, the juries are confined to the fact of publication and the truth of the innuendoes, and if such be the case, whether that rule is of force in this state? That a difference of opinion existed in England as to the rights of juries on this subject is very apparent from the parliamentary and judicial history of that country. In the senate and at the bar, as well as in the public prints, a most decided opposition was kept up for years, and it was only terminated by the statute of the 32 of George III., which restored to jurors the right of deciding upon the intention as well as the fact of publication and the truth of the innuendoes. As this statute, however, was not passed until long subsequent to the separation of the United States from Great Britain, its provisions are not binding here, but the law as it stood anterior to that statute must be our rule, unless controlled by other causes.

That the rule as laid down by the circuit court was the law of England, prior to the time of the statute, is, I think, abundantly evident. As early as the year 1731, Lord Raymond, in the case of *The King v. Franklyn*, distinctly recognized it as settled doctrine. His words were, there are three things to be considered, whereof two by you, the jury, and one by the court. The first is, whether the defendant is guilty of the publication, or not? The second, whether the expressions refer to his present majesty, or his principal officers, and one applicable to them or not? The third does not belong to the office of the jury, but to the office of the court. The intention was by him regarded as an inference of law. The same doctrine was recognized by Lord Chief Justice Lee, in 1752, in the case of *The King v. Owen*, 10 St. Tr. App. 194. In the celebrated case of *The King v. Wilkes*, in 1764, for publishing the forty-fifth number of the North Briton, the verdict of printing and publishing was regarded as a general verdict of guilty: 4 Burr. 2527.

Lord Mansfield, in the case of *Woodfall*, for publishing Junius, 5 Burr. 2661, stated that "guilty of printing and publishing,

where there is no other charge, is guilty; for nothing more is to be found by the jury." In this case he observed that this direction, though often given, with an express request from him, if any doubt existed as to its correctness, that the court might be moved upon it, was never complained of.

In the case of the *Dean of St. Asaph*, tried in 1784, Mr. Justice Buller laid down the same doctrine, which on appeal to the bench of judges, was fully and unanimously confirmed. In the case of *The King v. Sockdale*, as well as in that of *The King v. Withers*, Lord Kenyon supported the same doctrine: 3 T. R. 428.

If to authorities so high, any additional support be necessary, it is to be found in the reply of the twelve judges of England to the questions put to them by the house of lords, in 1783, when they had under consideration the libel bill. The question was, "whether, on the trial of any information, or indictment for a libel, is the criminality or innocence of the person set forth in such information or indictment as the libel, matter of fact, or matter of law, where no evidence is given for the defendant?" The answer was, "matter of law."

In opposition to decisions so uniform and commanding, the opinions of jurists at the bar and in the senate, however respectable, cannot be regarded as authoritative. They may, indeed, show what the law ought to be, but to the courts alone we can resort, to ascertain what the law is. That this rule is at variance with the general principles of law, is not denied. In every other case, without exception, where the general issue be joined, a general verdict resolves both law and fact. And although it be true as a general maxim that "*ad questionem legis respondent iudices, et ad questionem facti respondent iuratores*," yet where law and fact are blended, as they must be in the general issue, it is impossible to decide the one without the other, and therefore in all such cases, the juries, if they decide at all, must, *ex necessitate*, decide the law as well as the fact. Libels, however, are said to differ so much from all other criminal offenses as to justify a departure from the general rule of proceeding. Intention, which is the very essence of crime, is said in all other cases to be inferred alone from facts, which are within the province of the jury; but that in the case of libel the intention is an inference of law from a written instrument, the construction of which is always within the province of the court. But there is a manifest distinction between the purport or meaning of an instrument in writing and the intention, or

*quo animo*, with which that instrument was written. The most harmless words in their accustomed sense, may, under peculiar circumstances, indicate the most malicious disposition, and be productive of infinite mischief; whereas, words of a very different character may be uttered without malice, and from circumstances be perfectly harmless; and whether they be the one or the other, is a fact which can only be inferred from other facts, as time and place, etc.

To have written at one period of a man in France that he was a royalist, would have been malicious and injurious; whereas, the same epithet would now be regarded as harmless, if not complimentary. In civil cases, the intention or purport of the instrument is the only subject of inquiry. In criminal cases the *quo animo*, the disposition of mind with which the instrument was written, is the question.

The first is an inference of law, and properly belongs to the court; the last is an inference of fact, and ought to belong to the jury. This distinction is preserved in all cases of forgery. The jury are then not limited in their inquiry to the simple fact of execution, but determine the *quo animo* with which it was done. It was not, I apprehend, because jurors are less qualified to infer from circumstances the intention with which a libel had been published, than that with which a note had been executed, or that intention was not as essential to the constitution of a libel as forgery; that the law of England has reserved the first to the judges, and given the others to the jurors. In the peculiar form of the British government, I think is to be found the reason of the exception. Composed of three distinct orders, king, lords, and commons, much regulation was required to preserve each in its respective sphere. The history of England is scarcely more than the history of an almost perpetual contest for power between these different orders. Each in turn has gained the ascendancy; but neither has been able to destroy the other. The patronage of the king, the wealth of the nobility, and the physical power of the commons, acting in different combinations and under different circumstances, have hitherto preserved that balance of power on which the preservation of the government is supposed to depend. In these different contests, each order resorted to all the means it possessed for aggression or defense.

Perhaps the most formidable power which can be arrayed against prerogative is the press. If unrestrained, its success would seem to be almost inevitable. So formidable was this

power regarded by all parties, and so vitally connected was it supposed with the doctrine of libel, that we find the friends of prerogative, among whom have always stood pre-eminently distinguished the judges of England, invariably contending for the rights of the court, and the friends of the commons as invariably contending for the rights of juries. If to this peculiarity of the British government the rule in question is properly traced, it would only be consistent with a very common maxim of the common law itself, *cessante ratione cessat et ipsa lex*, to declare it not of force in this state, where we have but one order, and that order the people. But on this point, the act of the legislature, which makes of force the common law in this state, is explicit. It is of force, only so far as is consistent with our constitution, customs and laws.

In the case of *The State v. Lehre* [4 Am. Dec. 596], this point did not necessarily arise, but the court incidentally noticed it and observed that they were unanimously of opinion that the intention with which the publication was made, as well as the fact of publication and truth of the innuendoes, was involved in the general issue; and that the whole case, law as well as fact, was resolved by a general verdict; and such is now the opinion of this court.

The motion therefore for a new trial must be granted.

COLOOCK, RICHARDSON, and GANTT, JJ., concurred.

NOTT, J. I concur with this decision, because I think it is consonant with the provisions of the common law.

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The right to poll the jury in a criminal case is generally admitted: See Proffatt on Jury Trial, sec. 465; not, however, in Massachusetts: *Commonwealth v. Costley*, 118 Mass. 1. But in many states the procedure is regulated by statute as in California: Penal Code, sec. 1163, where the right in a criminal case is given.

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## STATE v. McDONALD.

[1 McCORD, 52.]

FORM OF INDICTMENT FOR RIOT.—Where, on an indictment for riot against the defendant and two others named, with “divers other persons, to wit, to the number of five,” without alleging that the five others were unknown, or setting out their names, and the grand jury found a true bill only against the defendant and one other, to which the defendant pleaded guilty, judgment must be arrested.

INDICTMENT against the defendant and two others, charging that they, together with "divers other persons, to wit, to the number of five," committed the offense, without alleging that the five others were unknown, or setting out their names. A true bill was found against the defendant and one other only. The defendant pleaded guilty, and a motion was now made in arrest of judgment, simply on the ground that the names of the others should have been given, or if unknown, that fact should have been expressly stated.

*Carter*, for the motion.

*Evencos, contra.*

By Court, JOHNSON, J. Notwithstanding the complaints that have been made against the strictness required in criminal proceedings, as tending to facilitate the escape of offenders, all must agree that to a certain extent it is indispensable; nor will it be denied that it is necessary to the purposes of justice, that the party accused should be fully apprised of the nature and identity of the offense for which he is called to answer. He ought to be protected from subsequent prosecution for the same offense, and the court ought to be enabled to judge from the record what the offense is, and to apply the judgment and punishment which the law prescribes.

Upon this principle, it is necessary to set out the name of the person against whom the offense was committed, not as a substantive part of the offense itself, but as a circumstance descriptive of its identity; and notwithstanding it is from necessity dispensed with when the name is really unknown, yet it is so steadily adhered to in the English courts, that where on the trial of an indictment for larceny, which laid the goods stolen as the property of a person unknown, the owner's name was developed, the prisoner was discharged, and a new bill of indictment preferred, setting out his name: 1 Chitty Crim. Law, 212.

For the same reason, the names of third persons, if they be necessary to the consummation of the offense, or constitute a necessary part of its description, should, if known, be inserted; with regard to which, the same strictness is required as in an indictment against an accessory, stating, contrary to the truth, that the principal was unknown, the court directed the prisoner to be acquitted: 1 Chitty Crim. Law, 212.

This case is, I think, precisely analogous to the present; and due uniformity of the precedents, with regard to this allegation,



leave no doubt on my mind as to the correctness of the principle; for such is the perfection of the English system of pleading, to which we profess to adhere, that not a single term is retained, which is not necessary to some object. It may be objected, however, that notwithstanding the indictment does not allege that the names of the five others were unknown, it may be implied from the circumstances that they are not mentioned. In criminal proceedings nothing is to be taken by intendment. The charge must be sufficiently explicit to support itself; for no latitude of intention can be permitted to include any thing more than is expressed: 2 Burr. 1127; 1 T. R. 69; 1 Leach, 249.

The application of these rules to the present case is manifest. The grand jury have found a true bill against only two of the persons that are named, and three are necessary to consummate this offense. Five others are spoken of, but not named, nor does the indictment charge that they were unknown. The first is necessary as a constituent fact of the offense, and the second as a part of its description and identity. The indictment is therefore bad, and the motion must be granted.

RICHARDSON, and GANTT, JJ., concurred.

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At common law a riot cannot be committed by less than three persons: 2 Hawkins C. 47, sec. 8; *State v. Brooks*, 1 Hill, S. C. 361; *State v. Egan*, 10 La. An. 698. And therefore if several be indicted for a riot, and the jury acquit all but two, they must acquit these also, unless it be charged in the indictment, that these committed the riot together with some other person not tried on that indictment. In Illinois, if two or more persons being together, do an unlawful act with force and violence, it constitutes a riot: *Dougherty v. People*, 5 Ill. 179. So in Georgia: *Prince v. State*, 30 Ga. 27; and in California: Penal Code, sec. 404. See, as to form of indictment: *Commonwealth v. Runnels*, 6 Am. Dec. 148.

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## BEITZ v. FULLER.

[1 McCORD, 541.]

**SEVERAL ACKNOWLEDGMENT.**—The acknowledgment of one of several makers of a joint and several promissory note, that the debt is still due, is sufficient to take the case out of the statute as to the others; and such acknowledgment may be given in evidence in a separate suit against any of the others, and will be conclusive unless rebutted.

**ACTION** on a note signed by the defendant with one Holt and another. Plea, statute of limitations. The material question is stated in the opinion.

*Simpson & Dunlap*, for a motion for a new trial.

*Oreswell*, *contra*.

By Court, COLCOCK, J. The statute of limitations operates on the supposition that the debt is paid. Anything, therefore, which shows satisfactorily that the debt is still due, is sufficient to prevent its operation. Now an acknowledgment of the maker, or one of them, is certainly for the most part the best evidence which the nature of the case admits, and although it may occasionally be susceptible of objection like all other evidence, it must be conclusive if not counteracted by opposing testimony. The authorities on this point are very satisfactory: 10 Johns. 35; 15 Id. 3; 2 Const. 111.

But it is urged in a written argument furnished by defendant's counsel, that the circumstances of the case vary it from the general doctrine. First, that the defendant in this case was a mere security, and Holt, who acknowledged the debt to be due, was the principal and insolvent, and that this is a joint and several note.

These grounds were not urged below, but they cannot avail the defendant. The two facts of his being the principal and insolvent could only go to his credit, and I think the first is calculated to give support to his evidence, for being the principal, he would best know whether the note was due, as in the usual course of business he would first have been applied to; and if the others had been made to pay it, they would no doubt have made some application to him.

His being insolvent could not be a reason why he should speak falsely on the subject. His insolvency might protect him for the time, but by reviving the debt he subjected himself to future liability if he should be more prosperous, and every man has a hope that in future he will succeed.

As to the last objection, of its being a joint and several note, it is equally inefficient; for although he is so bound, he may be sued jointly, and is in any event jointly liable. As a general rule, where one joint and several obligor is made to pay the whole, he can compel his co-obligor to contribute; and in the case before us, the defendant will have that benefit, even admitting it to be proved that Holt is insolvent. Authority is not wanting in support of this position; in 2 H. Black. (in the case of *Jackson v. Fairbanks*) 340, the assignee of one who was jointly and severally bound with others, paid a dividend on a note, which was barred; ruled sufficient to take it out of the statute.

This payment was made in consequence of the acknowledgment of the bankrupt co-obligor.

The counsel for the defendant in the written argument relies on the case of *Haskell v. Hart*, 2 Nott & McCord, 160, for support; but as far as the case goes, it certainly operates against him. The acknowledgment of Hart was permitted to go to the jury, but it was limited and referred to other circumstances, which, when developed, tended to rebut any presumption that the debt was still due, which may have arisen from the acknowledgment of Hart, that he had not paid it. In 2 Selwyn, 154, an acknowledgment by one of several makers of a joint and several promissory note, was holden sufficient to take it out of the statute against the others; and that such an acknowledgment, might be given in evidence in a separate action against any of the others: See Douglass, 657, *Whitcombe v. Whitney*, which I have examined, and it is directly in point.

The motion is discharged.

NOTT, RICHARDSON, and HUGER, JJ., concurred.

NEW PROMISE BY JOINT DEBTOR.—The decision here made is in accordance with the view uniformly taken of the statute of limitations by the courts of South Carolina prior to the case of *Young v. Monpoey*, 2 Bail. 278, regarding it as founded upon a presumption of payment of demands upon which the statutory time had run. Under this view a new promise or acknowledgment was looked upon merely as evidence to rebut the presumption raised by the statute; hence it was altogether immaterial whether such new promise or acknowledgment was made before or after the debt was barred, and, in either case, if made by one of two joint debtors, it was effectual against both. The presumption being rebutted, the liability existed in all its original force and vigor, just as if no such presumption had ever arisen. This was the principle of decision in the present case, and, in accordance with it, no mention is made of any distinction between promises and acknowledgments made before, and those made after the statutory time has run. And in *Veale v. Hassan*, 3 McCord, 278, decided upon its authority, there is a similar failure to observe the distinction. The case of *Young v. Monpoey*, however, as shown in the note to *Burden v. McEllenny*, ante, 570, put the law upon this subject in that state on a new foundation, upon which it has ever since rested. By that and subsequent adjudications it was established that the statute is not founded upon any presumption of payment, but upon principles of public policy, being designed to prevent the litigation of stale demands; and that, therefore, when the prescribed time has run the bar becomes absolute, and can only be removed by such an admission or promise as will be sufficient to make a new contract, based upon the original debt as a consideration. Such new promise is therefore held to be the real cause of action; and, of course, the liability of the parties is measured by it, and not by the former obligation. Hence, upon principle, it can be regarded as binding only upon those who assent to it.

The courts of South Carolina, therefore, now hold in accordance with these principles that, while a promise, admission, or payment made before the statutory time has elapsed, by one of two or more joint and several debtors,

will continue the liability as to all, and prevent the running of the statute, if it be made after the bar is complete, and will revive the debt only as to the party making it: *Steele v. Jennings*, 1 McM. 297; *Silman v. Silman*, 2 Hill, 416; *Meggett v. Finney*, 4 Strob. 220; *Goudy v. Gillam*, 6 Rich. 28; *Smith v. Caldwell*, 15 Id. 365. The case of *Silman v. Silman*, seems to have been the first to call attention to the distinction in its application to joint and several debts. O'Neill, J., in delivering the opinion, thus notices the failure of the principal case to observe the distinction: "In the case of *Burts* (reported as *Beitz*) v. *Fuller*, 1 McCord, 541, it was held that the acknowledgment of one of two makers of a joint and several promissory note, that the debt was still due, was sufficient to take the case out of the statute against the other. In that case, the note was given in 1808, the last payment on it was made in 1814, and the acknowledgment was in 1821, shortly before the bringing of the action. That case, like many of its predecessors and successors, did not distinguish between an acknowledgment made before or after a debt was barred by the statute of limitations." The case is also referred to in *Meggett v. Finney*, 4 Strob. 220, where its doctrine is thus limited to promises and acknowledgments made before the statute has run: "In this state, since the case of *Young v. Monpoe*, which, as to acknowledgments to take a case out of the statute of limitations, distinguishes between demands already barred and those not barred at the time of the acknowledgment, the question seems to have been at rest. Whilst in conformity with the case of *Beitz v. Fuller*, we hold that the acknowledgment of one joint debtor will serve as a continuation of the contract, to arrest the running of the statute as to the other debtors, when the debt has not been barred; we hold as in *Steele v. Jennings*, that the express promise of one partner, made after the dissolution, will not, as to the other partners, revive a debt already barred." The case of *Smith v. Caldwell*, 15 Rich. 365, is a valuable one on this point, presenting as it does in the opinion and in the arguments of counsel, a full array of the South Carolina cases as well as those of some of the other states, and an elaborate discussion of the principles upon which the statute is based. It was there held that where the principal in a joint and several note made by himself and a surety, made a payment thereon within four years after the cause of action accrued, and within four years from that time made another payment, and the action was commenced within four years after the second payment, but more than four years after the first, the action as against the surety was barred by the statute, on the ground that while the first payment made a new starting point so that the statute would not run in favor of the surety until the expiration of four years from that time, it did not give the principal any authority to extend the surety's liability by another payment or promise made within four years after such first payment, but more than four years after the note became due.

The distinction made in the South Carolina decision is recognized in *Cox v. Bailey*, 9 Ga. 467, where, upon the authority of the principal case, together with some from the other states, it was held that a promise made by one of several joint and several debtors before the case was barred would take the case out of the statute of limitations. Other cases holding that a new promise or payment by one joint debtor before the statute has run, will form a new point from which to reckon the limitation, not only as to himself, but as to his co-debtors, are *Tillinghast v. Nourse*, 11 Ga. 641 (where the correctness of the doctrine is doubted, although it is admitted to be the settled law of Georgia): *Hunter v. Robertson*, 30 Id. 479; *Trustees v. Hartfield*, 5 Ark. 551; *Hicks v. Lusk*, 10 Id. 692; *Burr v. Williams*, 20 Id. 171; *Sigourney v. Drury*, 14 Pick. 387; *Craig v. Calloway*, 12 Mo. 94; *Lawrence County v.*

*Dunkle*, 35 Id. 395; *McClurg v. Howard*, 45 Id. 365; *Block v. Dorman*, 51 Id. 31; *Vernon County v. Stewart*, 64 Id. 408; *Clark v. Sigourney*, 17 Conn. 511; *Bissell v. Adams*, 35 Id. 299; *Beardsley v. Hall*, 36 Id. 270; *Dinsmore v. Dinsmore*, 21 Me. 453. It is otherwise now in Maine by statute: *Odell v. Dana*, 33 Maine, 182. But it has been ruled in several of the states that a new promise or part payment by one of several joint debtors, whether made before or after the debt is barred, takes the case out of the statute only as to the party so promising. The following are some of the decisions to this effect: *Exeter Bank v. Sullivan*, 6 N. H. 124; *Kelly v. Sanborn*, 9 Id. 46; *Whipple v. Stevens*, 22 Id. 219; *Stowers v. Blackburn*, 24 La. Ann. 127; *Van Kuren v. Parmelee*, 2 N. Y. 523; *Shoemaker v. Benedict*, 11 Id. 476; *Winchell v. Hight*, 18 Id. 558; *Smith v. Ryan*, 66 Id. 352; *Hance v. Hair*, 25 Ohio St. 349; *Coleman v. Forbes*, 22 Pa. St. 156; *Bush v. Stowell*, 71 Id. 208; S. C., 10 Am. Rep. 694; *Louther v. Chappell*, 3 Ala. 353. The opinion of Allen, J., in *Shoemaker v. Benedict*, 11 N. Y. 476, and that of Bronson, J., in *Van Kuren v. Parmelee*, 2 Id. 523, will be found very instructive on this point as they examine the authorities bearing upon the question with critical research, beginning with the leading case of *Whitcomb v. Whiting*, Doug. 652. The power of a partner to revive the liabilities of the firm as against his co-partners, after a dissolution, is discussed in the note to *Chardon v. Oliphant*, 6 Am. Dec. 572, where a number of additional cases on this subject will be found cited. In several of the states, as in Maine and Indiana, this matter is now regulated by statute, and it is expressly provided that a new promise or acknowledgment shall not have the effect of preventing the operation of the statute, except as to the party making or assenting to such new promise or acknowledgment.

It must be confessed that the later and better decisions show a strong preference for the rule, that except in cases of a subsisting partnership, one joint debtor shall not have the power to deprive his co-debtors of the benefit of the statute by his own promise or admission, without their consent, and that in states where the contrary doctrine is established it seems to rest upon the principle of *stare decisis*, rather than upon sound reason. Thus, in *Tillingham v. Nowree*, 14 Ga. 641, the court adhere to the law of *Cox v. Bailey*, 9 Ga. 467, with evident reluctance, and in *Smith v. Caldwell*, 15 Rich. 365, it was expressly declared that the doctrine was not to be favored by extending it beyond the strict limits of the adjudged cases. Indeed, if the correct rule is, that the statute is to be regarded as one not founded upon the presumption of payment, but upon wholesome principles of public policy, and if the object is to put an absolute bar upon the litigation of stale demands, except where the benefit of the statute is expressly waived, it is not easy to see why one of the joint makers of a contract should be permitted to deprive his co-debtors of the relief afforded by the statute, without their consent. If the new promise is to be viewed as a new contract and a new cause of action, founded upon the original debt as a consideration, which the policy of the statute seems to require, then, to hold a party bound by such promise when he never made it, or assented to it, is to allow one man to make a contract for another. It is contrary to the general principle that no man's liability upon a contract shall ever be varied or extended without his consent. The true rule would therefore seem to be, that the new promise, admission or partial payment by one joint debtor should affect his co-debtors only, where by virtue of the relationship between them, he would have the right to bind them by a new contract, that is to say, where there is a subsisting partnership and the original liability was a firm debt, and where the promise or payment is made on behalf of the firm.

## McKEOWN v. JOHNSON.

[1 McCOMB, 972.]

**TRESPASS BY WIFE—HUSBAND'S LIABILITY.**—A wife cannot be held liable in an action for trespass committed in the presence of, and in connection with, her husband; for she is then supposed to be under his authority, and he alone is liable.

**PLEADING.**—Where the trespass is committed by the wife alone, the husband must be joined in the action; but the declaration must state that it was so committed by the wife.

**ACTION** on the case against a husband and wife for enticing away, and harboring a negro in the possession of the plaintiff. The declaration alleged the act to be done by them both jointly. It was proved that the plaintiff had hired the negro in question at one hundred and seventy dollars per annum. The evidence consisted of an admission of the husband "that his wife and children did harbor the negro, but against his will." The jury found a verdict for one hundred and seventy dollars. The defendant now moved for a new trial, because of excessive damages; and in arrest of judgment, because an action would not lie against husband and wife for jointly enticing and harboring a slave; but the declaration should have stated the enticing and harboring to have been committed by the wife solely.

*Pearson*, for the motion.

*Clark & Buchanan*, *contra*.

By Court, COLCOCK, J. In this case the motion in arrest of judgment must prevail. Trespass cannot be laid to have been committed jointly by husband and wife. If, in fact, it be so committed, the husband alone must be tried; for the wife is not implicated when acting in the presence of, or by the command of, her husband.

The only authority to be found against this doctrine is that to which the court has been referred in this case, viz.: 1 Chitty, 18; who certainly does say, that "for assaults and other wrongs, in which two persons may concur, the husband and wife may be sued jointly for the act of both, and the acquittal of the husband will not preclude the plaintiff from recovering." But on an examination of the authorities referred to, it will be found that they do not support the position. The case from Ventris states that it was an action against husband and wife, but does not state that it was charged to have been committed by both. On the contrary, it furnishes what is to my mind conclusive evi-

dence that it was not so, i. e., first, that the husband was acquitted, and secondly, it is said that in the case, that the husband ought to have been joined only for conformity, which seems to show that the act was committed by her alone. The other, *Herny v. Guie*, from Yelverton, 106, which is a case of trespass by the wife, and all the cases, as far as I could procure the books, seem as wide of the position. The case in 2 Bacon, 503, from 2 Lev. 63, when explained by the note, shows clearly that the act was done by the wife. I feel therefore bound by the long and well established doctrine, that a wife cannot commit a trespass, so as to be made liable to an action, in the presence of, or in connection with, her husband. In such case she is supposed to act under his authority, and he alone must be sued. Where the trespass is committed by the wife alone, the husband must be joined in the action, but the declaration must state that it was so committed by the wife: See 1 Chitty, 82; Bacon, title *Baron and Feme*; Comyn, same title; and also the case of *Chapman v. Hardy*, decided in this court.

The action being against both for a trespass committed by both, and the verdict general, the judgment must be arrested.

The motion is granted.

Norr, and Huger, JJ., concurred.

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The subject here considered will be found examined in a note to *Commonwealth v. Neal*, 6 Am. Dec. 105, where this case is noticed.

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## CATES v. WADLINGTON.

[1 McCord, 580.]

**NAVIGABLE RIVER, WHAT IS.**—The rule of the common law that only those rivers are considered navigable where the tide ebbs and flows, is not applicable to this country. A river cannot be considered navigable in which natural obstructions prevent the passage of boats of any description whatever.

**RIPARIAN OWNERS—RIGHTS OF.**—A river that is merely capable of being made navigable, is considered as respects the owners of lands bordering thereon as a mere imaginary line, and the claim of each extends to the center of the bed. But an individual has not such an exclusive right to a river which is capable of being made navigable, that the legislature may not declare it to be a public highway whenever the obstructions are removed, and it becomes fit for public use.

**PUBLIC AND PRIVATE RIGHTS IN.**—The public may use the waters for the purpose of navigation; but that does not impair the right of the individual to the soil and use of the water, as far as is consistent with the right of the public.

**DEBT on a bond.** The defense was a failure of consideration in part, which entitled the defendant to a deduction. It appeared that one Cates, in his life-time was seised and possessed of a tract of land lying on both sides of Enoree river, which in his will he directed his executors to sell. Pursuant thereto, the land was divided and sold in several lots. The defendant purchased and received titles for one lot or tract lying on the north-east side of the river. The words of the deed in reference to the grant were: "Grant, bargain, sell and release unto Jesse Wadlington all the right and title which the said Aaron Cates had at the time of his death, in and to all that tract or parcel of land containing four hundred and forty-three acres, more or less, situate in the district aforesaid, on the north-east side of Enoree river; and hath such shape, metes and bounds as by a reference to a resurvey plat thereof, hereto annexed, appears."

Annexed was a plat which was represented to include one half of the river. At the bottom of the plat was a certificate of a surveyor, stating his having measured and laid off the land described.

The bond was given for the purchase-money of the land. It was contended on the part of the defendant, that the plat by a reference became a part of the deed; and that one half of the river being included therein, the plaintiff bound himself to convey it; that the river Enoree was capable of being made navigable, although not so at present; and that rivers capable of being navigable, could not be granted as private property.

The jury, under direction, found a verdict for the plaintiff for the whole amount of the bond. A motion was made for a new trial on the following grounds: 1. That streams capable of navigation, or which may be made navigable, are not the subject either of grant or private property; 2. The plat and deed taken together, did convey to the defendant one half of the river; 3. Misdirection of the court as to the right of private property in streams capable of being made navigable; 4. That a discount ought to have been allowed from the amount of the bond.

*O'Neal & Johnson*, for the motion.

*Bauskett*, *contra*.

By Court, *Norr, J.* We have no legislative act declaring which, or whether any, of our rivers are to be considered as public or navigable rivers. In England, it appears that by the rules of the common law no river is considered navigable, except where the tide ebbs and flows: *Davis*, 152 157. But that



rule will not do in this state, where our rivers are navigable several hundred miles above the flowing of the tide. And there are some rivers in England, as Lord Hale expresses it, "whether they are fresh or salt, whether they flow or reflow or not, are *prima facie publica juris*, or public highways," etc.: Hargraves' Law Tracts, 9. The same author observes that fresh rivers, of what kind soever, do of common right belong to the owners of the adjacent soil; so that the owners of each side have of common right the propriety of the soil, and consequently the right of fishing *usque ad filum aquæ*: Id. 5.; *Carter v. Murcot*, 4 Burr. 2162.

And although we cannot define, by technical terms, what constitutes a navigable river in this state, yet I presume we may venture to say that cannot be considered a navigable river, the natural obstructions of which prevent the passage of boats of any description whatever. Nothing more is contended for on the part of the Enoree river than that it is capable of being made navigable, but not that it is so now. It must, therefore, be considered, as respects the owners of the adjacent lands, as a mere imaginary line. The claim of each extends to the centre of the bed; and *cujus est solum ejus est usque ad cælum*. If, therefore, the plaintiffs had actually conveyed one half of the river in so many words, they would not have conveyed more than they were entitled to convey. But the deed, in this case, is cautiously drawn. It contains no warranty; and the plaintiffs have conveyed nothing but the right and title which the testator had at the time of his death. I do not mean to say that an individual has such an exclusive right to a river which is capable of being made navigable, that the legislature may not declare it to be a public highway whenever the obstructions are removed, and it becomes fit for public use. The public may use the waters for the purposes of navigation; but that does not impair the right of the individual to the soil, and the use of the water as far as is consistent with the right of the public.

But admitting this to be a navigable river, I am not prepared to say it would affect the relative rights of these parties. I have already remarked that this deed contains no covenant of warranty. The plaintiffs have conveyed nothing more than the right and title which the testator had at the time of his death. And a purchaser must be supposed to know as well as the seller, what right and title an individual can have to a navigable river. The defendant purchased by certain metes and bounds; he is therefore entitled to all within those metes and

bounds. If the river be a part, he is entitled to all the interest which the testator had in it, and no more. The testator had a mill on the river. The defendant has had the quiet possession and enjoyment of it. He still continues to enjoy it, and is not likely to be disturbed. I have considered all the grounds of defense together, without a particular reference to each; and I am satisfied that the motion ought not to prevail.

The motion must be refused.

COLOOCK, RICHARDSON, HUGER, and GANTT, JJ., concurred.

See note to *Arnold v. Mundy*, *ante*, 356, where this topic is considered.

## BOND v. QUATTLEBAUM.

[1 McCORD, 584.]

**DAMAGES ON EVICTION.**—On eviction by a paramount title, the damages are the purchase-money and interest. There may be cases, however, where the rents and profits, in the meantime, will take away the claim of the party to interest.

**LAND SOLD BY METES AND BOUNDS.**—As a general rule, when a person sells land by the metes and bounds of an original grant, if the purchaser gets all the land embraced by that grant, he has no cause of complaint, except where there is a special covenant, or some willful misrepresentation.

**DEDUCTION FROM PURCHASE-MONEY.**—Where the object of a purchase has been actually defeated, by reason of a particular tract of land being less than was estimated, there should be a deduction from the purchase-money; and if a gross sum is paid without setting a specific value or any particular tract, then the deduction should be in proportion to its relative value and importance, when taken in connection with the whole.

**CONJECTURAL LOSS NOT CONSIDERED.**—A conjectural loss which may or may not be sustained by reducing the profits of a mill cannot be taken into consideration.

**ASSUMPT ON a note of hand, given for land, consisting of a number of tracts, lying contiguous to and adjoining each other.** The defendant claimed a deduction on account of a deficiency of land, defect of title, etc. It was contended: 1. That in two instances the lines of the adjacent tracts intersected or ran into each other; 2. That one line had been found shorter than was represented; 3. That to one tract the plaintiff had no title; 4. That by the loss of that tract the use of a mill was thereby impaired. A verdict was found for the defendant, and a motion was now made for a new trial.

*Gregg and Chappell*, for motion.

*Stark*, *contra*.

By Court, NOTT, J. It is now understood to be a settled rule of law, that where a person has been evicted of land, or what amounts to the same thing, when he is deprived of it by a paramount title in another, although there has been no eviction, he is entitled to recover back the purchase-money with interest, and nothing more. There may perhaps be cases where the rents and profits in the mean time will take away the claim of the party to interest.

It is only necessary, therefore, to lay down the rule to see at once that a new trial must be granted in this case. It was found upon a re-survey of the land, that there was left to the defendant a greater quantity of land than he had purchased, notwithstanding all the deductions of which he complains; so that the verdict, in fact, restored to him the whole of the purchase, giving him more land than he originally expected, and five hundred dollars in addition. Such a verdict, it is obvious, cannot be supported. It is, however, necessary to go somewhat more into a detail of the principles by which this case is to be governed, for the instruction of the court and jury, to whose decision it is again to be submitted. With regard to the first ground of defense, this court are of opinion that by the true construction of the deed there is no such intersection of the lines of the adjacent tracts as the defendant supposes.

The conveyance of the tract belonging to Charity Allen and family, as also that of the Livingston tract, calls for land as a boundary, with which it is supposed to interfere. Calling for it as a boundary, excludes the idea of running into it. The deduction, therefore, claimed on that account, cannot be allowed. The second item stands upon ground equally untenable. The plaintiff sold the land according to the metes and bounds of a certain grant, exhibited at the time. In closing the lines of that grant, one line is found to be shorter by about thirty chains than it was represented to be in the grant. And the defendant contends that he is entitled to a deduction for the price or value of all the land which would be embraced by the extension of that line to the whole length called for. In answer to which I think it may be laid down as a general rule, that where a person sells land by the metes and bounds of an original grant, if the purchaser gets all the land embraced by the grant, even though the lines shall be closed in a different manner than was contemplated by the parties, or should even contain less than it purports to contain, the purchaser can have no recourse to the seller, except upon some special covenant or intentional misrepresentation.

Every person accepts a grant upon the faith of the public, and not of the grantee. The grantee is not supposed, *prima facie*, to know anything more of it than what appears upon the face; and of that, the purchaser from him is supposed equally competent to judge. In this case, the defendant has all the land contained in the plaintiff's grant, and therefore has no right to complain. But this part of the defense stands upon still weaker ground. The defendant has never been disturbed in the possession of this land. He has shown no outstanding, paramount title. Nor does it appear that the plaintiff had not a good title to all the land which the defendant contends is included in this part of his deed. But that is not all. The reduction of this line is occasioned by the extension of another, which gives him at least double the number of acres which the grant was supposed to contain at the time of the purchase. So, that what he counts upon as a loss, is an actual gain to a greater amount than the loss which he pretends to have sustained.

With regard to the third item, the defendant has been more successful. He has shown a subsisting, outstanding title in Charity Allen, and her children, to a part of the land. He is, therefore, entitled to a deduction for that land, according to the price at which it was estimated at the time of the sale. And if the contract was for a gross sum, for all the land, without setting a specific value on each, or any particular tract, then the deduction must be in proportion to its relative value and importance, when taken in connection with the whole.

The conjectural loss which may or may not be sustained by reducing the profits of the mill, cannot be taken into the calculation. It would be violating the rule at first laid down, that the deduction should be made with reference to the value of the land at the time of the sale. The policy of allowing this species of defense where there has been no eviction is at least doubtful. If the embarrassments to which it has led had been foreseen, it is probable it never would have been introduced. But it has now been too long settled to be questioned. We must take care, however, to keep it within its hitherto prescribed limits. Consequential damages have never been allowed to be set off in any case. There must be an actual failure of consideration, or the defense is not supported. A danger remote or contingent is not sufficient. So far as the defendant can show that the object of his purchase has been actually defeated, he is entitled to a deduction, and no further. The motion for a new trial must be granted.

GANTT, COLCOCK, RICHARDSON, and HUGER, JJ.. concurred.

DECISIONS  
OF THE  
COURT OF APPEALS  
OF  
KENTUCKY.

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SHANNON *v.* KINNY.

[1 A. K. MARSHALL, 3.]

**IRRELEVANCY OF EVIDENCE.**—To sustain an objection to evidence merely on the ground of irrelevancy, it should appear to be so beyond all doubt, for if its competency be doubtful, it should be admitted, leaving its weight to be determined by the jury.

**ADVERSE POSSESSION UNDER DIFFERENT TITLES.**—To bar the plaintiff's claim to realty, it makes no difference whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor does it make any difference whether the possession be held by the same or by a succession of individuals, provided the possession be a continued and uninterrupted one.

**EJECTMENT.** The opinion states the case.

*Bibb and Hardin*, for appellant.

*Pope*, contra.

By Court,\* **BOYLE, C. J.** This was an action of ejectment. On the trial, after the plaintiff had exhibited the patent of the commonwealth to William Shannon for the land in controversy, and had produced evidence conducing to prove that William Shannon, the patentee, was the son of William Shannon senior; that the plaintiff, John Shannon, was the eldest brother of the patentee; that the patentee was killed by the Indians in 1782; that William Shannon, his father, died in a year or two thereafter, leaving John Shannon, the plaintiff, his eldest son, and after, it had also appeared in evidence that Hugh Shannon, a younger brother, had in the year 1784 settled upon the land in controversy, claiming it as his own, and had used and sold part

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\*The court, at this time, was composed of Boyle, C. J., Logan, and Ownley, JJ.  
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thereof; that for twenty years or upwards, John Shannon had been in habits of intimacy with his brother, Hugh Shannon, and was fully apprised of his claiming and selling said land, the attorney for the defendant asked a witness whether said Hugh Shannon had not latterly become insolvent, avowing his object to be to prove by that and other circumstances a collusive destruction of a writing evidencing a transfer of said land betwixt the plaintiff and Hugh Shannon, to the asking and answering of which question the plaintiff objected, but the court overruled the objection, and instructed the witness to answer the question, to which the plaintiff excepted.

Whether the court below erred in their decision of this point is the first question which is necessary to be determined.

The objection to the evidence is grounded merely upon its supposed irrelevancy. There is no question that in strict propriety the parties should confine their evidence to the matters in issue, and that proof wholly foreign to such matters is inadmissible; but to sustain an objection to evidence merely on the ground that it is irrelevant, it ought to appear so beyond all doubt, for it is a settled rule in all cases where the competency of evidence is doubtful, to admit it to go to the jury, leaving them to determine as to the weight to which it shall be entitled, and this rule ought to apply with peculiar force to a case like the present, where the objection to the evidence is founded solely on its irrelevancy. When tested by this rule, we apprehend the evidence admitted by the court below will not be found so clearly irrelevant as to justify its exclusion. The lapse of time, together with the accompanying circumstances, certainly affords a ground upon which the jury might presume a transfer in writing to have been executed, either by the patentee or the plaintiff to Hugh Shannon, and to strengthen this presumption, it could not be improper to account for the non-production of such a transfer. Circumstances, therefore, tending to create a presumption that it had been destroyed by the collusion of Hugh Shannon, would no doubt be admissible, and as circumstances have that tendency, would, in our apprehension, be more readily created by a jury who were informed that he had become insolvent, we cannot say that the proof of his insolvency was so utterly irrelevant as to justify its exclusion.

The only other question presented by the case is whether the statute of limitations was a bar to the plaintiff's recovery. It appears that there was a continual adverse possession for more than twenty years, but that Hugh Shannon, who first took pos-

session of the land in controversy, before he had remained in possession twenty years, surrendered the possession to the defendants, or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim, and that they had not had the land in possession twenty years prior to the commencement of this suit.

This circumstance, it is urged on the part of the plaintiff, prevents the statute from operating as a bar to his recovery. But we cannot perceive any principle upon which it can have such an effect. According to the literal import of the statute, the plaintiff could only enter upon the land within twenty years after his right of entry accrued, and consequently an adverse possession for that length of time will toll his right. Nor can it, in the reason and nature of the thing, produce any difference whether the possession be held uniformly under one title, or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor whether the possession be held by the same or a succession of individuals, provided the possession be a continued and uninterrupted one.

Judgment must be affirmed with costs.

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A similar case came again before the court under the title of *Shannon v. Dickenson*, reported in 1 A. K. Marsh. 5, in which Chief Justice Boyle delivered the opinion of the court, as follows: "This is an appeal from a judgment for the defendants in an action of ejectment. The points involved in this case are substantially the same as those decided in the cases of *Fox v. Hinton*, 4 Bibb, 559; *Thomas v. Havans*, Id. 563; and *Shannon v. Kinney*, decided at this term; and for the reasons stated in the opinions delivered in those cases, we deem the decision in the court below correct. Judgment affirmed with costs."

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## DANIEL v. ELLIS.

[1 A. K. MARSHALL, 60.]

**CHANGING ADVERSE TO FRIENDLY POSSESSION.**—An agreement not legally binding cannot change an adverse into a friendly and united possession.

A mere parol agreement by the tenant to buy the adverse title of the plaintiff's lessor will not stop the statute of limitations from running.

**ACTUAL POSSESSION OF PART.**—Where one has been in possession of the land in controversy for the statutory time, the plaintiff will be barred as to the whole tract, although the land had not been all used or occupied by an actual inclosure during that period.

**EJECTMENT.** The opinion states the case.

*Bibb and Wickliffe*, for the appellant.

*Pope*, contra.

By Court, LOGAN, J. This was an action of ejectment in which the opinion of the court upon the following points presents the only questions for the determination of this court: 1. On the part of the plaintiff the court was moved to instruct the jury "that if they were satisfied from the evidence that there had been a contract for the land in controversy between the lessor of the plaintiff and tenant Coons, although it was by parol as spoken of by the witnesses, yet it was such acknowledgment of title in the lessor of the plaintiff as rendered the possession so amicable as to prevent the statute of limitations from running against the lessor of the plaintiff." Which instruction the court refused to give. But gave the following upon the motion of the defendants: 2. "That if the jury were satisfied from the evidence that the defendants or their ancestor, by themselves or tenants, had been twenty years in continued possession of the land in controversy, under the patent of William Ellis, their ancestor, that the plaintiff's action was barred as to the whole land, although the land had not all been used or occupied by an actual inclosure for twenty years."

Upon both points we concur in opinion with the court below. It is not pretended, and the record does not warrant the idea that either of the defendants claimed by lease or as tenants of the plaintiff's lessor. Possession by some one or more of them had been continued from the year 1792 until 1811, under the claim of Ellis, when the lessor of the plaintiff became the purchaser of the adversary right; and agreed with Coons, one of the tenants in possession, who, by marriage had become interested in the claim of Ellis, that he should have the benefit of his purchase at the price of one dollar per acre. The contract was by parol, and subsequently treated by each party as not obligatory, as certainly it was not. It is impossible, in the nature of things, that an agreement not legally binding can change an adverse into a friendly and united possession. This is not like the case of *Gay v. Moffit* [5 Am. Dec. 633], in which there was a written contract, with a covenant to pay rent on certain contingencies. Then a good defense was created in favor of the tenant in possession under the plaintiff's claim, whereby the possession previously hostile was converted into a friendly possession, which furnished the defendant with the ample means of defense under the same title.

Upon the second point, there is less room to doubt the correctness of the opinion in giving the instructions asked. The case of *Fox v. Hinton*, 4 Bibb. 559, is directly applicable to this



point, and for the reasons contained in that opinion the instructions upon the present question were properly given.

See *Bailey v. Irby*, ante, 609, and note.

In *Broadale v. Speed*, 1 A. K. Marsh. 105, it is held that in ejectment the defendant must show twenty years' continued uninterrupted possession of the land, or the plaintiff's right of entry is not barred; occasional acts of ownership for that time do not bar the plaintiff. A similar decision was made in *McGee v. Morgan*, id. 62.

## CANNON v. ALSBURY.

[1 A. K. MARSHALL, 76.]

**PRIVILEGE OF INFANCY, PERSONAL.**—The privilege of infancy is personal, of which no one can take advantage but the infant, or his representatives; and, therefore, though the contract of an infant made with an adult be voidable by the infant, yet it is binding on the adult.

**INFANT'S PROMISE OF MARRIAGE.**—The promise of an infant to marry is in its nature beneficial, and, therefore, voidable only.

**VALID CONTRACT OF MARRIAGE.**—To make a binding contract of marriage, it should be expressed *per verba in presenti*; but there is a distinction between a contract of marriage and a contract to marry, for the breach of the latter, though expressed *per verba in futuro*, an action will lie.

**ALLEGING PARENT'S CONSENT.**—An infant plaintiff, in an action for the breach of a promise to marry, need not allege the consent of parent or guardian to marriage, as such assent affects only the solemnization.

**IN ERROR.** The opinion states the case.

*Bibb and Hardin*, for the plaintiff in error.

*Talbot*, contra.

By Court, BOYLE, C. J. This is a writ of error to a judgment for the plaintiff, in an action of *assumpsit* upon a promise to marry. The errors assigned are: 1. That the declaration is insufficient; 2. The court erred in the instructions given to the jury; 3. The court erred in overruling the motion for a new trial.

1. As to the insufficiency of the declaration. Previous to an examination of the particular objections relied on by the counsel for the plaintiff in error, it may be proper to premise that the declaration consists of four counts. The first is upon a promise to marry upon request; the second upon a promise to marry within a reasonable time; the third a promise to marry generally, without any specification of time; and the fourth upon a promise to marry within a reasonable time, at the house of William Catlett, at the mouth of Big Sandy. In each of the

counts, the promise of the defendant is alleged to be made in consideration of the promise of the plaintiff to marry the defendant. And in the first, the plaintiff avers her willingness and readiness to perform her promise, and a request to the defendant to perform his, and his refusal to do so; in the second and third, she avers her willingness and readiness, and her offer to perform her promise within a reasonable time, and his refusal to perform his; and in the fourth she avers her attendance within a reasonable time at the house of William Catlett, at the mouth of Big Sandy, and her offer to perform her promise, and the failure of the defendant to perform his. The averments are not only made in the most formal and technical manner, but the whole of the counts are drawn in the most exact conformity to the best and most approved forms to be found in the books of precedents: 2 Chit. Pl. 90, 91, 92.

But it is objected that as the plaintiff appears to be an infant, under the age of twenty-one, her promise was absolutely void, and it is therefore inferred that the promise of the defendant is without consideration, upon which an action will not lie. Was the position correct that the promise of the plaintiff was void because of her infancy, the conclusion attempted to be deduced from it, would be unquestionable, but the correctness of the position cannot be admitted. Acts not binding upon an infant are, in some cases, void, and, in others, voidable only; the acts of an infant which take effect by delivery are in all cases voidable only; and with respect to promises which do not take effect by the delivery, the distinction is between those which have and those which have no semblance of benefit to the infant, the latter being absolutely void and the former voidable only: Newland on Cont. 11, 12, 13; Bac. Ab. tit. Infancy and Age, I. and the cases there cited. As the promise of an infant to marry is in its nature beneficial, it evidently comes within that description of promises which are not void, but are voidable only, and it was accordingly so held in the case of *Holt v. Ward*, 2 Str. 337. That case having been decided by a very able court, and after great deliberation, the point has ever since been considered as incontrovertibly settled: 3 Atk. 610; Bac. Ab. tit. Marriage, B.

But, secondly, it is objected, that admitting the promise of the plaintiff to be voidable only, still until she came of age and ratified it, the promise of the defendant cannot be obligatory on him. This objection is not only unsupported by any adjudication, but is directly opposed to the whole current of authorities, as will be evinced by a reference to the books before cited.

The settled rule is that the privilege of infancy is personal, of which no one can take advantage but the infant or his representatives, and, therefore, the contract of an infant made with an adult be voidable by the infant, yet it is absolutely binding upon the adult, otherwise the privilege intended solely for the benefit of the infant would operate greatly to his prejudice.

But thirdly, it is objected that the contract to marry, as set forth in the declaration, being to be performed in *futuro*, is void. It is true, that to make a binding contract of marriage it should be expressed *per verba in presenti*, and that a contract expressed *per verba in futuro*, does not, in estimation of law, constitute a marriage; and this is all that can be inferred from what is said by Blackstone in his Commentaries, 1 vol. 436, to which we were referred by the counsel for the plaintiff in error; but it does not follow, because a contract of this sort, expressed *per verba in futuro*, does not operate as a contract of marriage, that it is not obligatory upon the parties, nor that an action will not lie to recover a compensation for a failure to perform it. The action in this case is predicated upon the idea that there was a contract to marry, not a contract of marriage, contracts as clearly distinct as a contract to convey land is from a conveyance of land; and as the law allows an action to be brought upon a contract to convey land for a breach thereof, so it is equally well settled, that an action may be maintained upon a contract to marry: Bac. Ab., title "Marriage," letter B.

But, fourthly and lastly, it is objected that the declaration is defective for the want of an averment that the parent or guardian of the plaintiff had consented to her intermarriage with the defendant. The necessity of such an averment was supposed by the counsel for the plaintiff in error to be deducible from the provisions of the act regulating the solemnization of marriage: 2 Littel, 64. The provisions from which this inference is attempted to be deduced, prohibit the celebration of the rites of matrimony in any case without license, and require, where either of the parties are under the age of twenty-one, the consent of the parent or guardian to be given before license shall issue. These provisions relate only to the marriage itself, and evidently cannot affect the promise or the contract to marry. They do not even annul a marriage entered into contrary to these requisitions. Indeed, some of the provisions of the act, especially the tenth section, appear plainly to presuppose that a marriage of an infant, though without the consent of the parent or guardian, would, if otherwise unexceptionable and

duly celebrated, be valid. But, be this as it may, as it is clear that none of the provisions of the act affect the capacity of an infant to promise or contract marriage, it must remain as it did before the passage of the act, and consequently the manner of declaring upon such an act must be the same. If, therefore, it be necessary to show the consent of the parent or guardian, it is sufficient to do so in evidence, without specially alleging it in the declaration. But when the female party is plaintiff, as in this case, we apprehend it is not even necessary for her to show in proof that her parent or guardian had consented to the marriage. As the law requires such consent before license can legally issue, there can be no doubt that if the consent cannot be obtained, it will be a sufficient excuse for a failure to perform the promise or contract to marry. But from the nature of the transaction, as well as from universal usage, it is the duty of the male party to ask for the consent of the parent or guardian. The law, indeed, only requires the consent to be given as a means for obtaining the license, and it was not pretended in the argument that it was not the business of the male party to procure the license, and if he be bound to obtain the license, he must necessarily be bound to use the means which the law has appointed for the purpose. Upon the whole, therefore, we are of opinion that neither of the objections taken to the declaration can be sustained.

The second and third errors assigned, may, with propriety, be considered together; for the instructions complained of were not excepted to when given on the trial, but were stated only as one ground upon which the application for a new trial was founded, and it is the only ground relied on in the argument in this court. The instructions given to the jury were, in substance, that if they believed the evidence proved a contract to marry, to have been made between the parties, and the mouth of Big Sandy at the house of William Catlett to have been appointed as the place for them to intermarry, on a given time, the attendance of the plaintiff at the time and place was a sufficient offer on her part to perform the contract. As an abstract proposition, there can be no doubt, when there is a time and place appointed to perform a contract to marry, that the attendance of the female party at the time and place agreed on would be a sufficient offer on her part. But in this case, though there was a place appointed by the parties for the performance of the contract, the evidence does not warrant the conclusion that there was any definite time agreed on for that purpose, nor

is there any allegation in the declaration to that effect. It is true, where there is no time fixed upon by the parties, that the law requires such a contract to be performed in a convenient and reasonable time, but what is a convenient and reasonable time depends upon circumstances, and cannot, with propriety, be said to be a given time according to the usual acceptation of the expression. The instructions of the court, therefore, being predicated upon the existence of an agreement to marry on a given time, were inapplicable to the case, and consequently, though correct when absolutely considered, were irrelevant to the point in issue.

But surely the mere irrelevancy of instructions given by the court to the jury is not a ground, which, in itself, independent of all other considerations, is sufficient to authorize the granting of a new trial. That irrelevant evidence had been admitted to which no exceptions were taken on the trial, would not be a sufficient ground for setting aside the verdict, and there seems to be no difference in principle in this respect between the admission of irrelevant evidence and the giving of irrelevant instructions. Had injustice been done by the verdict, there might be some pretense for urging the irrelevancy of the instructions, as auxiliary to other causes, for a new trial; but there is no probability that the verdict is contrary to justice, or that a second trial would result in a trial essentially different. For to every point which it was necessary for the plaintiff to prove, evidence was adduced amply sufficient to justify the verdict of the jury. To grant a new trial, therefore, merely on account of the irrelevancy of the instructions, would be doing that which would be vain and useless; for on the same allegations and on the same evidence the same verdict ought to be given on a second trial. In this respect, this case differs materially from the case of *Hally v. McCargo*, 4 Bibb. 343, which was relied on in the argument. But in another respect that case differs still more essentially from this; for the verdict and the judgment in that case, we then thought and still think, could not have been used as a bar to an action, for the cause which the evidence given in that case would have supported.

Judgment must be affirmed, with costs.

## HICKMAN v. GRIMES.

[1 A. K. MARSHALL, 66.]

**SPECIFIC EXECUTION OF PAROL CONTRACT DENIED.**—A mere oral promise to convey a certain tract of land to a son in consideration of blood and affection is not sufficient to warrant a decree of specific execution, even in favor of a purchaser from the son.

**SPECIFIC PERFORMANCE WHEN DENIED.**—It is a general rule that if an action at law will not lie upon a contract to recover for its breach, equity will not decree its specific execution.

**APPEAL** from the circuit court. The opinion states the case.

*Haggin*, for the appellant.

*Wickliffe and Hughes*, contra.

By Court, **BOYLE, C. J.** This was a bill filed by Benjamin Grimes against James Hickman, jun., and his father, James Hickman, sen., to obtain a conveyance of one hundred acres of land, which James Hickman, jun., had given his obligation to convey to Grimes, in consideration of the latter having undertaken to build for him a framed house of certain dimensions. Grimes alleges that he had nearly completed the house, and would have finished it, but for the failure of James Hickman, jun., to find such of the materials as he was bound by the terms of the contract to furnish. He states that the title of the land was in James Hickman, sen., who had frequently declared he had given it to his son, James Hickman, jun., and that he would convey it whenever directed to do so by his son, but that the latter had refused to procure the title, etc. The bill was taken for confessed, and an interlocutory decree pronounced against both defendants; but afterwards, James Hickman, jun., filed his answer, and at a subsequent term a final decree was given that James Hickman, sen., should convey to the complainant, by deed with general warranty; that both defendants should pay to the complainant his costs; and from that decree this appeal has been prosecuted. As the answer of James Hickman, jun., admits the execution of the obligation by him for the conveyance of the one hundred acres of the land, for the consideration in the bill mentioned; and as the evidence satisfactorily shows that the greater part of the work was done, and that the whole would have been completed but for the failure of the defendant to furnish such materials as he was bound to do; it is plain that the complainant has shown himself entitled to relief against him. But we are clearly of opinion that the decree against James Hickman, sen., is erroneous and can-

not be sustained. It is not alleged that he had executed to his son a covenant or deed, binding himself to convey the land in controversy, and a mere promise to convey, founded upon no other consideration than that of blood or relationship, we apprehend is not sufficient to justify a decree for its specific execution. Where such consideration is united to the efficacy of a deed, and the contract is executory, its execution may be decreed by a court of equity, as was held in the case of *McIntire v. Hughes*, 4 Bibb.

But we are aware of no case in which it has been decided that a promise to give or convey land, founded upon the consideration of consanguinity alone, could be enforced in a court of equity. Such a consideration would certainly not be sufficient to support an action of *assumpsit*; and it is a general rule, that if an action at law will not lie upon a contract to recover damages for its breach, a court of equity will not decree its specific execution. Besides, it is inferable from all the cases which have any bearing upon this point, that a contract without being by deed, founded upon such a consideration only, would not be sufficient to create a trust at common law, nor an use under the statute of uses: *Vide Roberts on Fraudulent Conveyances*, 89, 90. The decree against James Hickman, sen., is therefore erroneous, and must be reversed. But, as it appears from the answer of James Hickman, jun., that he can, in all probability, procure the title from his father, he ought to have been decreed to have done so, and to have conveyed to the complainant, or to make a compensation in damages, if, in the event, it should turn out that he was unable to procure the title.

The decree must be reversed with costs, and the cause remanded, that a decree may be entered not inconsistent with the foregoing opinion.

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## HART v. BRAND.

[1 A. K. MARSHALL, 189.]

**WHEN SPECIFIC PERFORMANCE DECREED.**—Whether the performance of a contract should be specifically decreed, depends upon the circumstances of the case. Accordingly, where the purchaser, in a contract for the sale of land, has with good faith shown a willingness and readiness, without injury to the vendor, to perform substantially the agreement, he will be entitled to the aid of a court of equity.

**INTEREST STOPPED BY VENDOR'S ACT.**—If the purchaser were really and *bona fide* ready to make payment and intended to do so, but was prevented from so doing by the act of the vendor, the latter will not be entitled to interest.

ERROR to the circuit court. The opinion states the case.

*Wickliffe*, for the plaintiff in error.

*Haggin*, *contra*.

By Court, LOGAN, J. This was a suit in chancery to compel the specific execution of a contract in the sale of a certain tract of land.

On the third of September, 1813, Hart covenanted to convey to Brand this tract of land at twenty-five dollars per acre, payable at different periods; the first payment to be made on the twenty-fifth of December then ensuing, or as soon as possession could be obtained, and the balance in two equal annual payments from the time of receiving possession, with interest, to be annually paid; or, if the purchaser preferred, he might have two and three years to make the payments for the further sum of six hundred dollars; the land to be conveyed upon the receipt of the first payment, and the purchaser to give a deed of trust to secure the residue of the consideration.

The circuit court decreed the execution of the contract; and Hart prosecutes his writ of error, assigning as error the following: 1. That a court of equity ought not, under the circumstances of the case, to interpose, but should leave the party to his remedy at law; 2. That a conveyance ought not to have been decreed without allowing to Hart interest on the purchase-money, from the time of his having made a tender of a deed to Brand; 3. That the decree is erroneous in giving cost, the suit having been brought without a tender of the consideration or a demand of the possession of the land; 4. It was error to postpone the execution of the contract until the thirty-first of January, 1817, and defer until then the payment of interest; 5. It was error to leave the complainant at liberty either to comply with the decree or not, and providing, after all power over the cause had terminated, for the dismissal of the bill in the event of his failing to comply.

1. Whether equity ought to give the relief sought surely depends on the circumstances of the case. The amount of the payment on the twenty-fifth of December could be ascertained only from the number of acres in the tract. On the twenty-fourth Hart proceeded with a surveyor to ascertain the quantity, but the surveyor not being able to plot and give the precise quantity on that day, Hart informed Brand that about ten o'clock the next day he might see him at Postlethwait's tavern, in Lexington. Brand accordingly attended, and remained there



some time; but Hart was detained and did not arrive until twelve or one o'clock; and it so happened that each was inquiring for the other, but did not meet together until about four o'clock. The writings were then to draw and the money to be paid. By the time the deeds were written it was late. Hart then informed Brand that he was ready to perform the contract on his part, tendered his deed and demanded the money. Brand offered him a check on the bank, where he had more than the amount deposited. But Hart refused to receive the check or take bank notes. Brand, in the meantime, had prevailed on a friend to wait on the cashier of the bank, and request his attendance, for the purpose of procuring the specie. The bank was then not open for ordinary business; but the messenger having returned and informed them that the cashier would be there immediately. Hart refused to wait, and having tendered his deed, mounted his horse and left town.

It appears that Brand could, on that evening, have procured from the cashier the specie. His credit was good, and his character for punctuality unquestionable. There was no willful evasion or premeditated lying back by him. On the contrary, he was really desirous that the contract should be carried into effect. He could have had no motive to equivocate or avoid it, for the land had increased considerably in value; and to obtain possession was certainly an object, and the money, as to him, was lying unemployed.

But the agreement did not depend on the payment of the money as a condition precedent, whereby the mere casual failure to make payment, on the precise day, should render it invalid. It is sufficient to justify the aid of a court of chancery, that the purchaser has, with good faith, shown a willingness and readiness, without injury to the vendor, to perform substantially the agreement. And when the vendor has himself been instrumental in producing the delay, or has given countenance thereto by lying back, the effect thereof ought not to be solely applied to the purchaser, and thus deprive him of the benefit of the contract, to meet which, he may have sustained other sacrifices.

But, independent of these circumstances, the first act to be performed was by the vendor, in the delivery of the possession of the land, which still remained in the occupancy of his tenant. And, although the purchaser might have waived its delivery, and relied on the alienation to himself and the acquiescence of the tenant, he was, nevertheless, not strictly bound to do so.

The tenant might have withheld from him possession, until coerced to surrender it. This the purchaser was not bound to risk. This court, therefore, concurs with the circuit court in opinion upon the merits.

The second and third errors assigned, may be considered together. They embrace these questions: 1. Whether the vendor was entitled to interest; 2. Whether the vendee was entitled to the cost of the suit.

With respect to interest, no proposition can be more clear, that if the purchaser were really and *bona fide* prepared to make payments, and intended to do so, free from all shuffling equivocation and technical quibble; and the vendor has ever since evinced a determination not to perform the contract if possible; having never given notice to the vendee when to attend on the premises and receive possession, that he is not entitled to interest. In other words, one holding himself in readiness to pay, and the other refusing to do what the contract enjoined upon him, ought to subject the latter to the loss of interest, and not the former. The wrong was with him, and he cannot charge the effect to the other.

And as to cost, it is equally clear, that the decree is correct. Why the incurment of cost? Because the benefit of the contract could not be otherwise obtained. This is demonstrable, not only from the other evidence in the cause, but from the answer also. To have tendered the money or demanded possession under the circumstances, would have been an idle show of form and ceremony. If the defendant intended to comply, by receiving the money and delivering the land, why did he not rest his defense as to the cost upon this ground, without resorting to points evidently for a different purpose? The real object was clearly to get rid of the bargain; and the next to secure interest and cost. It is impossible not to perceive from the whole evidence, that this was the object; and, if possible, to make the experiment at the expense of the purchaser, upon misapplied rules of rigid technical pleading.

The fourth and fifth errors assigned may also be taken together. They relate to the usual powers of the chancellor in decrees of this kind, in giving time to perform, and prescribing the conditions upon which the performance shall be enforced. The time given must rest according to circumstances, within the discretion of the court. But in the present instance as to the length of time, it surely illy becomes the defendant to complain, because he might, before that day, have executed

the contract. The extent of the time was clearly for his own convenience, as it afforded the opportunity of securing the growing crop, and terminating a probable lease. And had the defendant offered to perform the decree on an earlier day, as by the decree he might have done, and the complainant had refused to make the first payment, and to do what was equitable, agreeably to his contract, such a refusal would have been equally within the power of the court, as when refused on the most distant day given by the decree. In one case a dismissal of his bill would have been the consequence; in the other, if not a dismissal, at least interest on the money. The decree prescribed only the time and manner of executing the contract. This was not necessary to be performed in court; indeed, in part, it was impossible that it could be there performed. The court however retained, from its nature, a controlling power over its execution. Had controversy arisen about the payment of the money, or a tender and refusal on the most distant day given by the decree, certainly this might have furnished proper ground to excuse the non-performance thereof, or to have coerced it, according to the event, as exhibited to the court. Every act, in fine, done out of court, towards the execution of the decree, was subject to the revision of the court, who alone was competent to judge of and control its abuse.

Upon the whole, therefore, we are of opinion that the decree is correct, and that all the consequences of complaint and injury are more properly attributable to the vendor himself. In his subsequent proposal, pending the suit, to perform the contract, if the complainant would pay the first and second payments, was a condition not within the agreement, the second payment being due only within a year after the complainant should get possession of the land.

The decree must be affirmed, with costs.

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## MILLER v. HUGHES.

[1 A. K. MARSHALL, 181.]

**PARTNERS, WHO ARE.**—Where two or more persons unite in business, one contributing money and the other labor, the profits to be divided between them, such union is a partnership.

**AGREEMENT TO SHARE PROFITS.**—One who shares in the profits of a partnership must also share the losses.

**PARTNER'S PRIVATE INSTRUCTIONS.**—Partners have equal authority over the partnership affairs, and one cannot, by any private instructions, limit the power of the other to bind him in a partnership transaction.

APPEAL from the circuit court. The opinion states the case.

*Bibb*, for the appellant.

*Hardin*, contra.

By Court, BOYLE, C. J. This was an action upon a promissory note, purporting to be executed by Miller and Bickly to Thomas Stewart, and assigned by him to the plaintiff. Miller denied by his plea the execution of the note, upon which issue was joined.

On the trial it appeared from the evidence that Miller, who resides at Cincinnati, had established a house at Louisville for the sale of liquors; that he employed Bickly to attend to the business; that Miller was to furnish all the stock in trade, and that Bickly, as a compensation of his services, was to have one third of the profits arising from the business; that in the absence of Miller, Bickly executed the note in his own and Miller's name for the price of wine and brandy purchased by him, to be sold in the course of said business; and that the wine and brandy so purchased afterwards came to the possession of Miller. It also appeared in evidence that Miller had instructed Bickly to make no purchase of any one except Paxton & Co., and that the purchase for which the note in question was given was not made of them.

The main question is, whether, under these circumstances, Miller and Bickly were partners or not. For if they were partners, as the note was given in the regular course of transacting the partnership business, it is plain that Miller must be bound by it; nor can the circumstance of his having instructed Bickly not to purchase of any one but Paxton & Co., make any difference. That was a matter which concerned themselves only, and could not affect a contract made with any other; for as partners have equal authority over their partnership affairs, it would be preposterous to suppose that either of them could, by such instructions, limit the power of the other to bind him.

Whether they ought to be considered as partners or not, is a question about which we have had some doubt; but we are inclined to think they were partners. Partnership is defined to be a voluntary contract between two or more persons, for joining together their money, goods, or labor, upon an agreement that their gain or loss shall be divided proportionably; and whether each contributes money or labor, or both money and labor, or as in the present case, one finds money and the other labor, still it is equally a partnership.

The principal ground urged in the argument in this case against considering Bickly and Miller as partners was, that there was no agreement that Bickly should be liable to sustain a proportion of the loss, if any should happen in the course of trade. But as he was entitled to a share of the profits, it follows as a legal consequence that he must share the loss. The rule in this respect is, that he who shares in the advantages, must also share in the disadvantages of the partnership concern: *Watson on Partnership*, 15, 61.

We are, therefore, of opinion that the circuit court correctly instructed the jury that Miller and Bickly were partners, and consequently that there was no error in refusing to give a contrary instruction.

Judgment affirmed, with costs and damages.

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See *Osborne v. Brennan*, *ante*, 614; *Spears v. Toland*, *post*.

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### EAST v. MATHENY.

[1 A. K. MARSHALL, 192.]

**MISREPRESENTATION MADE BONA FIDE.**—One who relies upon representations untrue in fact, and suffers loss, is entitled to remuneration, although such representations were innocently made.

**APPEAL** from the circuit court. The opinion states the case.

*Bibb*, for the appellant.

*Pope*, *contra*.

By Court, *BOYLE*, C. J. Matheny purchased of East two lots in the town of Nicholasville, then inclosed with a post and rail fence, and having some other improvements on them; and after making additional improvements, discovered that these improvements, as well as a part of those that were made before his purchase, though within the fence with which the lots were inclosed, were outside of the true boundaries of the lots.

To obtain compensation for the loss of the improvements thus found to be outside of the true boundaries of the lots, and to have the same set off against a judgment recovered against him by East for a part of the price of the lots, Matheny filed his bill with injunction, and on a final hearing the circuit court, after having caused a jury to ascertain by their verdict the amount of compensation to which he was entitled for the loss of the improvements, directed that the injunction should be made per-

petual for the sum so ascertained by the jury. And from that decree East has appealed to this court.

Though the bill charges East with fraud in selling that to which he knew he had no title, the evidence in the cause is wholly insufficient to establish the charge. The establishment of the charge of fraud is not, however, indispensably necessary, as we apprehend, to render him liable to make compensation for the loss of the improvements. The proof satisfactorily shows that he represented to Matheny the fence inclosing the lots as their boundary, and this representation, though innocently made, was untrue in fact. As Matheny, by confiding in this erroneous representation, was induced to expend his money in improvements made off the true boundaries of the lots, East, whose error produced the expenditure, ought in equity and good conscience to sustain the loss. With respect to Matheny's claim to an indemnity for the improvements on the lots when he purchased, there is still less room to doubt of its propriety; for these improvements must, in proportion to their value, have tended to enhance the price of the lots, and consequently must have constituted a part of the consideration which both parties expected Matheny to receive for the price which he agreed to give.

The decree must be affirmed with costs.

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### SPEARS v. TOLAND.

[1 A. K. MARSHALL, 208.]

**LIABILITY AS PARTNERS.**—Persons who by their dealings with others, and in other respects, hold themselves out to the world as partners, will be liable as such, notwithstanding private articles of dissolution of partnership entered into between the parties.

**ERROR** to the circuit court. The opinion states the case.

By Court, OWSLEY, J. This writ of error is brought to reverse a judgment rendered against the plaintiffs in error as merchants and partners trading under the firm and style of Timberlake & Spears, in an action of *assumpsit* brought against them in the court below by the defendants in error, as merchants, trading under the style and firm of Toland & Son.

The trial was had in that court on the general issue; and after the plaintiffs then had introduced and gone through evidence tending to prove the partnership of the defendants, and the justice of the demand against them, the counsel of the de-

defendants, after producing and reading in evidence an article of the dissolution of the copartnership between them, of a prior date to that of the contract upon which this suit was founded, but without proving by any other evidence when it was executed, moved the court to instruct the jury that under the circumstances of the case, the confessions of the defendant, Timberlake, were not legal evidence to charge the defendant, Spears, as his former partner; and further that the defendant, Spears, was not, under the circumstances of the case, bound as the partner of Timberlake; and, also, to instruct the jury that the plaintiffs had no right in law, according to the rules of evidence, to recover in the present action; but the court overruled the motion, and the defendants having excepted, spread all the evidence introduced by both parties upon the record.

Whether the confessions of Timberlake were competent to charge Spears with the plaintiff's demand turns upon the sufficiency of the evidence introduced in the cause to show that previous to those confessions being made, the partnership of Timberlake & Spears had been actually dissolved; for, if as was decided in the case of *Walker v. Duberry*, at this term, the partnership between them had been previously dissolved, no confessions of Timberlake thereafter made could subject Spears to the payment of Toland's demand; but if a partnership still existed between them, as in that case, each would be liable for the acts of the other, it is plain that Spears might be made chargeable upon Timberlake's confessions.

In deciding, therefore, upon that branch of the motion which asked an instruction of the jury, that the confessions of Timberlake were not legal evidence to charge Spears, it became material for the court below to inquire, and it is proper that this court, in revising that decision, should now inquire whether, from the evidence introduced, a partnership existed when these confessions were made. Let it not be said that, as this inquiry involves a decision upon the evidence in relation to an existing state of facts, it ought regularly to be made by the jury, and not by the court; for as the competency of evidence must be decided upon by the court, the court may, most clearly, decide upon any evidence in relation to facts necessarily involved in the questions of competency. The court may, no doubt, waive a decision of those facts, and leave them to the consideration of the jury; and in that point of view the court below may have correctly refused to give the instructions to the jury.

But assuming that court, in overruling the motion, to have

decided upon the evidence in relation to an existence of the partnership, we have no doubt the instructions were properly withheld. For although an article of prior date, dissolving the partnership between Timberlake & Spears, was introduced, yet, as from the evidence in the cause, those persons, subsequent to the date of that article, and at the time the contract was made upon which this suit is founded, by their dealings with others, and in other respects, held out an idea to the world of their being partners, in the absence of any other evidence conducing to prove the partnership had been previously dissolved, the court correctly held the confessions of Timberlake legal evidence.

And if those confessions were admissible there is no doubt but, in connection with the other evidence introduced, the plaintiffs, in that court, manifested very satisfactorily, a good cause of action, and the court, consequently, properly overruled the application of the defendants there, for the other instructions to the jury.

With respect to the other points in the cause, they are clearly untenable.

The judgment must, therefore, be affirmed, with costs and damages.

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*See Miller v. Hughes, ante, 719; Osborne v. Brennan, ante, 614.*

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## MASON v. BAKER.

[1 A. K. MARSHALL, 208.]

**SALE TO HINDER CREDITORS.**—A bill of sale to hinder and delay creditors, though binding as between the parties, is void as to creditors, and purchasers with notice, as well as without notice.

**POSSESSION BY VENDOR.**—The possession by the vendor of the articles mentioned in a bill of sale is a badge of fraud.

**APPEAL** from the circuit court.

The opinion states the case.

*Bibb and Woodson*, for the appellants.

*Hardin*, contra.

By Court, BOYLE, C. J. This was a bill filed by the appellant to recover the possession of sundry slaves from the appellees, and to restrain them, in the meantime, from removing the slaves beyond the jurisdiction of the court. The appellants assert



their right to the slaves in question as the heirs of William Hamlet, under and by virtue of a bill of sale executed to him by the appellee, Martin Baker, bearing date the fourteenth of February, 1787, and recorded in the county court of Halifax, and state of Virginia; and they allege that the other appellees purchased from Baker, shortly before the commencement of this suit, with full knowledge of their right. The appellees, among other matters of defense, rely that a court of equity has no jurisdiction of the case, and that the bill of sale executed by Baker to the ancestor of the appellants was given without valuable consideration, with an intent to hinder and delay creditors, and that therefore it was fraudulent and void. And although the appellees who were purchasers from Baker admit that they had heard of the appellants' claim, yet they allege that they were at the same time informed that it was illegal and fraudulent.

The court below, on a final hearing, dismissed the bill, and the appellants have brought the cause to this court.

As the law affords a remedy by an action of detinue, or of trover, in a case like the present, it is extremely questionable whether a court of equity can entertain jurisdiction to any extent in such a case, but waiving a decision of this point, we can have no hesitation, upon the merits of the case, in affirming the decree of the court below.

The bill of sale, under which the appellants claim, is not only expressly proven to have been executed for the purpose of hindering and delaying Baker's creditors from the recovery of their debts, but the transaction is accompanied with all the marks or badges which carry with them internal evidence of fraud. At the time of executing the bill of sale, Baker was deeply involved in debt; and although it purports to have been made upon valuable consideration, there is no proof of any such consideration having been paid by Hamlet. It contains not only a transfer of the slaves in question, but of all Baker's property liable to execution, even his beds and other household and kitchen furniture; and though absolute on its face, the possession of the property remained with Baker from the date of the bill of sale until the present time, with the exception of two or three years, when Baker was absent in this country, and had left his family with Hamlet in Virginia. From these circumstances, therefore, independent of any positive proof to that effect, we would be bound to conclude that the bill of sale was, in law, fraudulent; and if so, it is clear, that a court of equity

cannot enforce it, or sustain the appellant's claim, having for its foundation such a fraudulent transaction. It is true that the bill of sale, though fraudulent and void as to creditors and purchasers, is nevertheless binding at law upon the parties to it, and that a court of equity would not interfere on behalf of Baker to set it aside. But it is equally true that a court of equity cannot accordingly, to the principles by which it is invariably governed, lend its aid to give effect to the bill of sale; for Hamlet as well as Baker is *particeps criminis*, and equally guilty of the fraud; and the rule is, that in respect to parties to a fraud *in pari delicto melior est conditio de fendentis*, and most indubitably the appellants, as heirs of Hamlet, can stand in no better situation than he would have done had he been complainant. Such would have been the case had Baker still retained possession of the slaves, and had been the only defendant. But having sold the slaves to the other defendants, they must, as purchasers, occupy still more favorable ground. It is contended, indeed, that they are not *bona fide* purchasers. 1. Because they had notice of the appellant's claim; 2. Because the price they gave was not a full one; and, 3. Because it appears, from an indorsement upon the bonds for the purchase-money, that a part of the price is not to be paid unless this suit should be determined against the complainants.

The analogy, supposed in the argument, between the case of notice by a subsequent purchaser of a prior equity, and that of notice of a previous fraudulent sale, certainly does not exist. In the former case, the subsequent purchaser would, in equity, be affected by notice, but in the latter case it has long since been settled, that notice cannot affect him; and this doctrine, we apprehend, is perfectly correct, for the statute declares such fraudulent sales void, not only as to purchasers generally, whether with or without notice; and, on general principles, there is no ground upon which that which is void can be made good by notice.

As to the price agreed to be given for the slaves by the other defendants, to Baker, not being a full one, it may be sufficient to remark that the price, though not as great as was commonly given for slaves of the same description, where the title was indisputable, does not appear to be inadequate for the slaves in question, incumbered, as they were, not only by the complainant's claim, but by another claim, which is proven to be hanging over them, derived from a different source.

With respect to the indorsement upon the bonds for the

purchase-money, purporting that the price, or a part of it, was not to be paid unless this suit should be decided against the complainants; that, from the very nature of the thing, must have been an arrangement made after the commencement of this suit, and was probably entered into as a precautionary measure, to enable the purchasers to indemnify themselves without further trouble, in case of an actual loss, so that it can furnish no rational presumption that the purchase, which was made before the commencement of the suit, was not firm and *bona fide*.

Decree affirmed with costs.

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See *Clow v. Woods*, 9 Am. Dec. 346, and note, showing the doctrine held in Pennsylvania that the continuance in possession by the mortgagor of chattels mortgaged, without any constructive delivery or record of the mortgage is fraud, *per se*, as to creditors. See further: *Sturtevant v. Ballard*, and note, 6 Am. Dec. 281, holding that in New York the retention of the possession by the vendor of chattels sold is only *prima facie* evidence of fraud.

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## JOHNSTON v. MITCHELL.

[1 A. K. MARSHALL, 225.]

**DEPENDENT COVENANTS.**—As a general rule, where one party is unable to perform his part of the contract, he is not entitled to performance by the other party. But if one has performed a valuable part of the contract, and without any fault in him is unable to perform the residue, such case might form an exception.

**PERFORMANCE OF ENTIRE CONTRACT.**—Where a contract is entire, equity will decree an entire performance or a total rescission; it cannot rescind as to a part and affirm as to the residue which has been performed. If the rights of third persons are involved, the parties must be left to their remedies at law.

**APPEAL** from the circuit court. The opinion states the case.

*Bibb and Talbot*, for the appellant.

*Hardin*, *contra*.

By Court, BOYLE, C. J. On the ninth day of September, 1789, Mitchell and Johnston entered into a contract to exchange lands, whereby Mitchell agreed to make Johnston a good right, by deeds of general warranty, to two hundred and sixty-five acres on the south fork of Elkhorn, and one thousand one hundred and sixty-eight acres at the Clay Lick and Stony Crossing, on the Kentucky, then surveyed, but the plat not returned; in consideration of which, Johnston agreed to convey to Mitchell,

by deeds of general warranty, five hundred acres, one half of William Galloway's pre-emption, on Stoner's Fork of Licking, and one hundred and odd acres of Coon's pre-emption, and also two hundred acres near the head waters of the Big Bone Lick Creek; each party to make the deeds to the other, when demanded, allowing a reasonable time for the patent to be obtained for the one thousand one hundred and sixty-eight acres; and it was agreed, as the one thousand one hundred and sixty-eight acres were surveyed, that if it should be altered so as to injure it before it was returned, said Mitchell should allow said Johnston for damages in the land Johnston conveyed to him.

In pursuance of this contract, Johnston conveyed to Mitchell three hundred and ten acres of Galloway's and Coon's pre-emptions, and Mitchell conveyed to Johnston a part of the tract of two hundred and sixty-five acres on Elkhorn, and the balance, being one hundred and fifty acres, to one Shannon, at the request, and for the benefit, of Johnston.

In this situation things remained until the year 1808, when Johnston filed his bill in chancery against Mitchell's heirs (he having theretofore departed this life), in which, after stating the contract and its partial performance, as just mentioned, he alleged, in substance, that Mitchell failed to return the original survey of the one thousand one hundred and sixty-eight acres, and caused a re-survey at a late period to be made, variant from the former, and including land less valuable, and that the re-survey was made contrary to law and to location, and entirely covered by adverse elder grants; and he prayed, in substance, that the contract, so far as it had not been performed, might be rescinded, and that he might be restored to the possession of the land which he had not conveyed, and remunerated in damages for its deterioration, etc.

Mitchell's heirs, in their answer, admitted the contract and its part performance, as stated by Johnston, and that a re-survey had been made of the one thousand one hundred and sixty-eight acres; but denied that it had been made contrary to law or location, or that the land included in it was of less value than that embraced by the original survey, and, if it should be found to be so, alleged their willingness that Johnston should be compensated for the difference of value, according to the terms and intention of the contract; and they insist upon their ability to convey the one thousand one hundred and sixty-eight acres. They also filed their cross-bill against Johnston, insisting, in substance, upon the same matters as they had done in their

answer, and praying that the contract might be specifically carried into effect.

Johnston having died pending these suits, they were revived in the names of his heirs; and coming on to be heard, the circuit court decided that Mitchell's heirs should convey to Johnston's heirs the one thousand one hundred and sixty-eight acres, and make them compensation for the difference in the value of the land contained in the first and that contained in the second survey, and decreed that Johnston's heirs should, after retaining what would be sufficient to make such compensation, convey the residue of the land, which Johnston had contracted to convey, but had not conveyed. From that decree, Johnston's heirs have appealed to this court.

The first question which naturally occurs is, whether Mitchell's heirs have shown themselves entitled to insist upon a performance of the contract. The proof and exhibits demonstrate, beyond question, that the whole of the one thousand one hundred and sixty-eight acres, covenanted by Mitchell to be conveyed to Johnston, is covered by elder adverse grants, and there is no attempt to show that the entry upon which the survey has been made is a valid one; so that Mitchell's heirs do not appear to have any title, either at law or in equity, and it is clear therefore that they cannot make a good right to the one thousand one hundred and sixty-eight acres, as their ancestor bound himself to do. Now, as a general rule, it is indisputably settled that where one party is unable to perform his part of the contract, he cannot be entitled to the performance of the contract by the other party. If, indeed, he has performed a valuable part of the contract, and his inability to perform the residue is produced without any default in him, his case might form an exception to the general rule. But, in the present case, it is evident that the inability of Mitchell's heirs to make a good title to the one thousand one hundred and sixty-eight acres is attributable, at least in part, to an inexcusable negligence on the part of their ancestor; for he was bound, not only from the nature of the transaction, but by the terms of the contract, to procure a patent for the one thousand one hundred and sixty-eight acres in a reasonable time; but, instead of doing so, he failed to make a re-survey until 1797, and did not procure the patent to issue until 1806, a period of about eighteen years from the date of the contract, and in the meantime an elder grant had issued for a part of the same land, long after the lapse of what must be deemed a reasonable time for procuring his grant.

We feel ourselves bound to say, therefore, that Mitchell's heirs have not shown themselves entitled to insist upon a performance of the contract on the part of Johnston's heirs.

The next inquiry is, whether the contract can be affirmed, so far as it has been performed by the parties, and rescinded as to the residue, at the instance of Johnston or his heirs. That this cannot be done, we apprehend, is perfectly clear. The contract is an entire one, and its entire performance, or total rescission, can only be decreed by a court of equity. But Johnston does not ask for a total rescission of the contract, and, indeed, it is apparent that he would have no right to do so; for this could be done only upon his restoring, or offering to restore, Mitchell, or his heirs, *in statu quo*; and this could not be effected, inasmuch as Johnston took a conveyance to a third person of a part of the land which Mitchell was bound to convey.

We had at first view some doubt whether Johnston, or his heirs, might not be permitted to retain of the land conveyed, or to be conveyed by him, so much as would be equal to the value of the one thousand one hundred and sixty-eight acres, under the stipulation in the contract, that if the survey should be altered so as to injure it before it was returned, Mitchell should allow Johnston damages in the land conveyed by him. Upon further reflection, however, we are inclined to think that this stipulation only provides for a compensation for any difference that might be in the land contained in the first and second survey. To extend it, therefore, to the case of a total inability to convey, especially as that does not appear to have been produced by the alteration of the survey so much as by the neglect to have had the resurvey made and carried into grant in a reasonable time, would be, in effect, to make a contract for the parties, instead of decreeing the specific execution of a contract already made by them.

Upon the whole, therefore, we are of opinion that a court of equity cannot, under all the circumstances of the case, decree either a performance or a rescission of the contract; and that the parties ought to be left to their respective remedies at law.

The decree of the circuit court must be reversed, with costs, and the cause be remanded, that the original and cross-bills may be dismissed, each party paying their own costs.

## BARLOW v. BELL.

[1 A. K. MARSHALL, 246.]

**IMPROVEMENTS BY BONA FIDE HOLDER.**—Equity will compensate the possessor of realty for improvements thereon, made *bona fide* under the belief that the land was his own. But one who takes possession without title and bestows labor upon lands, knowing them to belong to another, is not entitled to compensation.

**APPEAL** from the circuit court. The opinion states the case.

*Wickliffe*, for the appellant.

*Hughes*, *contra*.

By Court, OWSEY, J. Sometime early in 1801, the appellant purchased from a certain John Bell, who acted as the agent of his father, William Bell, a tract of land in Barren county, and having obtained from the agent a deed of conveyance, he settled upon the land, and made lasting and valuable improvements. Whilst the appellant was thus possessed of the land, but after the appellee's husband, William Bell had departed this life, she asserting title in her own right, brought suit, and finally succeeded in recovering the land. To obtain compensation for his improvements, the appellant brought this suit in equity, but the court being of opinion his claim could not be sustained, dismissed his bill with costs; and from that decree the appellant has appealed to this court. As the labor bestowed in improving the land, is sunk in the land, and was not done at the appellee's request, it is plain that she cannot, upon any common law proceeding, be subjected to the appellant's claim for compensation.

Nor have we been able to find any adjudged case, where the English courts of equity have, under such circumstances, decided upon the right to compensation; but regarding courts of equity, in supplying the defects of the common law, as being governed by the principles of natural justice, in the absence of all precedent, we should have no hesitation in relieving the possessor for improvements made upon the land whilst he, *bona fide*, considered it his own. The possessor, by bestowing his money and labor in meliorating the land, advances its value, and, consequently, the rightful owner, unless liable to the claim of compensation, is so much gainer by the loss of the possessor; contrary to the maxim, *nemo debet locupletari aliena jactura*. But to bring himself within the influence of this principle, it is not enough that the possessor shows himself to have meliorated the

land, but his money and labor must be bestowed under an honest conviction of his being the rightful owner of the land. For if he takes possession without title, and knowing the land belongs to another, he is himself guilty of a wrong, and although he may have expended his money, and bestowed his labor, his claim for compensation ought not to be sanctioned by a court of equity; but in such a case, the maxim *volenti non fit injuria*, well applies.

As in the present case, therefore, the appellant is shown to have had a perfect knowledge of the appellee's title, and was advised of the consequences of a purchase from the agent of William Bell, before he made the purchase, he cannot be viewed in the favorable attitude of a *bona fide* possessor, so as to warrant the decree of a court of equity in his favor for improvements made upon the land.

The decree of the court below, dismissing his bill, is, consequently correct, and must be affirmed with cost.

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In *Thomas v. Thomas*, 16 B. Mon. 424, the principles here enunciated are referred to with approval, and followed. The supreme court of Alabama, in *Horton v. Sledge*, 29 Ala. 499, held that no allowance for improvements should be granted to one who made the same, knowing that his title was disputed, and in support of their position relative to the question of improvements, cited *Barlow v. Bell*, *supra*; *Bell v. Barnett*, 2 J. J. Marsh, 516; 1 Story's Eq. Juris. 729, sec. 655; *Parkhurst v. Van Cortland*, 7 Am. Dec. 427; *Wendell v. Van Renssaeler*, 1 Johns. Ch. 354; *Town v. Needham*, 3 Paige's Ch. 554; *Smith v. Brown*, 3 Rich. Eq. 299; *Thurston v. Dickinson*, 2 Id. 317; *Gunn v. Brantley*, 21 Ala. 646; *Goodwin v. Lyon*, 4 Porter, 316.

The subject is further discussed in a note to *Whitledge v. Wait*, 2 Am. Dec. 721.

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## EMBRY v. MILLAR.

[1 A. K. MARSHALL, 309.]

**LAWS GOVERNING PERSONALTY.**—The succession to personal estate is to be governed by the laws of the place where the decedent was domiciled; but to recover any part thereof it is proper that administration be granted in the place where the property is situated.

**IDEM.**—**LETTERS TESTAMENTARY WHEN GRANTED.**—Letters testamentary should be granted according to the laws of the place where the estate of the decedent was situated at the time of his death. Accordingly, where goods are brought from one country to another, the administrator appointed in the former may act in the latter.

**APPEAL.** The opinion states the case.

*Hardin and Wickliffe*, for the appellant.

*Pope*, *contra*.



By Court, OWSELY, J. This is an appeal from a judgment rendered against Embry in an action of detinue brought by him to recover from Millar several slaves. Embry asserted his right to the slaves through Randolph Sims, and for the purpose of showing Sims' title offered to prove by parol evidence the contents of a bill of sale, alleged to have been given to him by a certain Matthew Sims, who is admitted to have been formerly the proprietor of the slaves, but as the execution of the bill of sale was not admitted, although its absence may have been sufficiently accounted for, the court no doubt properly refused to permit parol evidence of its contents to go to the jury. Embry, moreover, for the purpose of manifesting Randolph Sims' right to the slaves introduced as evidence the transcript of the proceedings and judgment rendered in his favor in an action of detinue, brought for the same slaves since the death of Matthew Sims, by his administrators, appointed by the county court of Madison; but upon its being proven that Matthew Sims died intestate, in the Spanish dominions, and his being domiciled in that country at the time of his decease, and upon its being also proven that the slaves in contest were brought to this country since his death, the court below refused to allow the transcript to be used before the jury.

Whether, therefore, the transcript should have been used as evidence, is the principal question involved in the determination of the present case. As the judgment purports to have been rendered upon the trial of the general issue, Randolph Sims, in whose favor it was pronounced, might, no doubt, use it in bar to any other action which might be brought to recover the slaves, by the administrators; and if the administration was regularly granted, as in that case the administrators would be entitled to the possession of the intestate's slaves; the judgment, as it concludes them, must, of necessity, imply an absence of right in their intestate, and hence, in any other contest between the parties to that judgment involving the right to the slaves at the intestate's death, the judgment would not only be admissible, but conclusive evidence. And if conclusive against the administrators, as the heirs of the intestate could not regularly gain the possession of the slaves without their assent, it follows, that if the heirs should become possessed, they ought not to occupy more favorable ground, and consequently, in an action against them for the slaves, either by the defendant to the action brought by the administrators, or any person claiming under him, the judgment should be received as evidence.

But as it is in consequence of the administrators being entitled to the possession of the intestate's slaves that the judgment against them implies an absence of right in their intestate, it follows that if owing to any irregularity in the county court's granting the administration, persons named as administrators gained no right to the possession, the judgment, as it in that case must have been rendered against those having no right to demand the estate of the intestate, cannot conduce, in the slightest degree, either to prove Randolph Sims, in whose favor it was entered, or Embry, his alienee, is entitled to the slaves.

Whether, therefore, the court decided correctly or not in rejecting the transcript of the proceedings and judgment, turns exclusively upon the regularity of the order of the county court in granting the administration. In making this inquiry, we shall assume the fact to have been proven that the intestate neither resided nor had any property in this country at the time of his decease, and examine whether, upon the slaves being brought into the county of Madison, that court was authorized to grant the administration. According to the act of 1797, 1 Lit. 618, it is clear that no other county court can grant administration upon the estate of an intestate than such as might have taken probate of his will, had one been made, so that, in deciding upon the present case, it becomes material to look into the tenth section of the act cited, 1 Lit. 613, for the purpose of ascertaining the jurisdiction of county courts in testamentary matters. That section, after declaring "the several county courts shall have power to hear and determine all causes, matters, suits, and controversies testamentary, arising within their respective jurisdictions," provides "that they shall examine and take the proof of wills, and grant certificates thereof, according to the methods and rules following; that is to say, if any testator shall have a mansion house, or known place of residence, his will shall be proven in the court of the county wherein such mansion house or place of residence is; and if he have no such place of residence, and lands be devised in the will, it shall be proven in the county where the lands lie, or in one of them, where there shall be land in several counties; and if he has no such place of residence, and there be no lands devised, then the will may be proven either in the court of the county where the testator shall die, or that wherein his estate or the greater part thereof shall be.

As the provision in the section just cited in relation to land, can have no bearing upon the question of administration; and

as the intestate Sims is shown to have died in the Spanish dominions, where he is proven to have resided, it follows that if the county court of Madison possessed the power to grant the administration, it must have derived it from that provision which authorizes the court of the county wherein the estate, or the greater part thereof, shall be, to take the probate of a will.

The circumstances of the intestate being, at the time of his decease, domiciled in the dominions of Spain, abstracted from every other consideration, cannot have made it irregular for the county court to grant the administration.

The succession to his personal estate should, no doubt, be regulated by the laws of the country where Sims died; but to recover any part thereof which may have been in this country at that time, as the remedy must be governed by the laws here, there should most clearly, as was decided in the supreme court of the United States, in the case of *Fenwick v. Sears*, 1 Cranch, 289, and in the case of *Dixon v. Ramsey*, 3 Id. 319, be administration obtained from the proper court in this country.

The latter of these cases was brought by an executor in the District of Columbia, upon letters testamentary granted in a foreign country, and although the principle is there admitted that the succession to the testator's personal estate is to be governed by the law of the country where he died, yet upon the principle of the remedy being regulated by the laws of the place where the suit is brought, it was held that the action could not be maintained.

As from the authorities in Cranch, therefore, it is proper, to enable the executor to recover the possession of the testator's estate in certain cases, although he may have been domiciled abroad, to obtain probate of his will, where suit is brought. In giving an exposition to the act of this country, conferring jurisdiction in testamentary matters, we should, unless restrained by a different import, so interpret it as to enable the courts of this country to take the probate in those cases, as well as when the testator may have resided here.

In deciding upon the section alluded to, then, as it contains no expressions calculated to restrain the taking of probate, to those cases where the testator may die or reside in this country, but has used language sufficiently comprehensive to embrace the case of those residing beyond the limits of the country also, we can have no hesitation in rejecting that construction which would restrain the taking of probate in the former cases, in exclusion of the latter.

Notwithstanding, however, probate may be taken of the wills of persons domiciled in other countries, the inquiry arises whether or not to enable the court to do so, the estate of the intestate should not be within this country at the time of his decease?

The section of the act already recited, as we have seen, directs the will to be proven in the court of the county where the estate, or the greater part thereof, shall be, so that a decision of the question just put turns upon the further inquiry, whether or not those expressions should be construed to relate to the county where the estate may be at the decease of the testator, or to the county where it may be at the taking of the probate.

Viewing the whole section together, we have but little hesitation in adopting the construction, which relates to the former in exclusion of the latter county. This construction not only accords with what we suppose the most obvious meaning of the legislature; but a different construction would involve the absurd consequence of permitting the jurisdiction in such cases to be exercised by the court of any county to which the estate might, either by accident or design be conveyed.

That the construction we have adopted is correct will be the more obvious from a slight attention to the laws of England in relation to the probate of wills made in foreign countries. Not that we should be understood as deducing from those laws any testamentary jurisdiction in the courts of this country, but we would resort to them for the purpose of ascertaining, by a knowledge of them, the most probable intention of the legislature in their enactment upon the subject.

Thus it is said that if a will be made in a foreign country, disposing of goods in England, it must be proved where the goods are: Toller's Law of Executors, 72; 11 Vin. Ab. 58; but if the goods were all abroad, and the will be proven according to the custom of the country where the testator died, it is sufficient: Toller, 72. And to a suit brought by the administrator in England for an account of the decedent's estate, it is moreover said that the executor may plead such matter in bar: 1 Vern. 397.

These authorities, whilst they are in accordance with the cases from Cranch, show the necessity of proving the will in the country where the estate of the testator may be at the time of his death; they also demonstrate that according to the doctrine of the English law, no probate is necessary to be obtained from the courts of that country where the estate is not within the kingdom at the testator's death, and hence we apprehend, ac-

according to the law of that country, the executor may recover upon a probate taken in a foreign country, property which is brought to the country after the death of his testator.

And if so, when the legislature of this country was about to create testamentary jurisdiction, as they had previously adopted the laws of England, it was clearly unnecessary to provide for the taking of probate when the estate of those domiciled in other countries should not, at their death, be within this country. And hence, as it was unnecessary in such cases for probate to be obtained in this country, the section in question, especially as it imports a different meaning, ought not to be construed so as to allow the courts here to exercise cognizance upon the property, being brought to the country after the death of the testator. And if in such a case the will cannot be proven by the courts of this country, it follows that, as the slaves of Sims were brought to the county of Madison after his decease, that court ought not to have granted the administration; and being granted without competent authority, the court below did right in refusing to permit it to be used before the jury.

The judgment must be affirmed with costs.

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See *Desobate v. Berquier*, 2 Am. Dec. 448, and note.

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## WHALEY v. ELIOT.

[1 A. K. MARSHALL, 343.]

**LAND SOLD BY THE ACRE.**—Where a number of acres of land, part of a large tract, is sold at a certain sum per acre, and the deed does not contain the words "more or less," equity will relieve, if, upon a resurvey, there is discovered an unusual excess or deficit.

**APPEAL** from the circuit court. The opinion states the case.

*Bibb*, for the appellant.

*Wickliffe*, *contra*.

By Court, LOGAN, J. The appellees exhibited their bill to recover the surplus contained within the boundaries of a piece of land, conveyed by their ancestor to the appellant, in March, 1788. The court below having decreed a reconveyance of the surplus, to be laid off on either side or end, at the election of the purchaser, he has appealed to this court.

The contract was made in 1785, and the land surveyed in 1786. The quantity sold was one hundred and eighty-five

acres—part of a larger tract; and the survey is now found to comprehend two hundred and fifteen acres. Eliot died nearly twenty years before the commencement of this suit, leaving infant heirs. And it does not appear that he had ever discovered that there had been a mistake in the execution of the survey, or an unusual excess in the quantity.

The first question occurring for the consideration of this court is, whether the complainants were entitled to relief? And second, if they were, what should have been the relief given?

The sale was certainly a sale by the acre. A specified quantity, part of a larger tract as described, without the insertion of the words "be the same more or less," or any other words indicating the slightest intention of any risk in the quantity, other than would result from the nature of the contract and the usual excess or deficit which might be expected.

This court has indulged the greatest liberality with respect to an excess or deficit which might reasonably have been within the contemplation of the parties, as expressed in their deed. Good policy required that too easy an ear should not be given in such cases; and that nothing but the clear right of the complainant, of which he had been deprived through fraud or palpable mistake, ought to induce the interposition of the chancellor. There is, however, obvious distinction between sales by the acre and sales in gross; and if a sale be of so many acres, part of a given tract, and of a particular tract, described partly by its supposed quantity. This distinction is recognized and more fully explained in the case of *Young v. Craig*, 2 Bibb. 270.

In sales of the former description more accuracy in admeasurement is certainly within the contemplation of the parties. Indeed, in such cases, nothing but the great difficulty, if not impracticability of producing upon different experiments precisely the same results, could justify the least variation from the exact quantity sold. For in every departure from the precise quantity there would in that degree be a variance from the contract. And it is the duty of a court to aid in the effectuation of contracts, as made agreeably to their fair import and just stipulations; and not to indulge too far in substituting provisos arbitrarily as forming part of a contract, which is neither expressed nor necessarily implied in the contract, and which indeed the mere suggestion thereof in making the bargain might have prevented its consummation. And as in the case of a de-

licit the purchaser would in that degree feel himself injured, so in the instance of an excess the seller would experience a like injury, and both be equally entitled to the benefit of the contract as made, and to relief against fraudulent or mistaken departures therefrom.

Some allowance, however, must be made for the different results which will unavoidably be produced upon different experiments. And what should be the extent of that allowance will perhaps be more properly left to the circumstances of each case, according to the period's reasonable usages when the contracts were made. If the excess or deficit shall be too much for ordinary mistakes, or usual allowances, mistakes which might not reasonably be expected, the injured party ought to be relieved.

Here was a sale of a precise quantity of land for a given price; but in laying off that quantity it is found that by mistake about sixteen per cent. has been added. If, instead of this excess, there had been a similar deficit, ought the purchaser to be thereby concluded and all redress denied him? There must be some point for the correction of such mistakes. In the present instance, we apprehend, the mistake was unreasonable, more than usual, and could not have been expected, and ought, therefore, to be corrected: See the case of *Nelson v. Mathews*, and the cases there cited, 2 Hen. and M. 168 [3 Am. Dec. 620]. This court concurs, therefore, with the court below, that the present is a proper case for relief. But what should be the nature and extent of the relief is the next inquiry proposed.

We can perceive but little or no difficulty in responding to this inquiry in the case before us. By the decree the purchaser is at liberty to lay off the surplus on either side or end. There is no circumstance showing that the decree will operate otherwise injuriously to the appellant than in the loss of the surplus. By the contract he was entitled to a precise quantity; but he has obtained more than that quantity, and the addition of ordinary allowances for probable mistakes in admeasurement; so that, in fact, he acquired, by this mistake, the land of the seller, with which we have, from the deed, a right to presume he did not intend to part. And there being no peculiar circumstances of hardship in the case, and the right of one thus held by another, it of course presents no other question than the right to recover the surplus property of which another has improperly acquired the possession. This court, therefore, concurs likewise in the nature and extent of the decree.

The staleness of the demand, only for the special circumstances of the death of the seller and infancy of his representatives, without a knowledge of the mistake, might afford a ground of defense. But under these circumstances, we think no inference can be drawn of consent, which should operate to the prejudice of the appellees.

The decree must therefore be affirmed, with cost.

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See *Hundley v. Lyons*, 7 Am. Dec. 685; *Smith v. Evans*, 6 Id. 436; *Nelson v. Carrington*, Id. 519; *McCoun v. Delany*, Id. 635.

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## MCNEIL v. DIXON.

[1 A. K. MARSHALL, 385.]

**PAROL EVIDENCE OF BOUNDARIES.**—Parol evidence in relation to the boundaries of the land, or to the place of executing the survey, although such boundaries differ from the courses described in a patent, is admissible.

**ERROR.** The opinion states the case.

*Hardin*, for the plaintiff in error.

*Bibb*, *contra*.

By Court, LOGAN, J. This was an action of ejectment, in which the principal question was, whether the land in contest was also comprehended within the elder patent of the defendants.

Upon the trial of the cause exceptions were taken to the admission of testimony to prove the declarations of McNeil, the lessor of the plaintiff, in relation to some of the boundaries of the defendants' survey, and that the survey was in fact made on different ground from that embraced by the courses of the patent.

This court is of opinion that the evidence was properly admitted. In few cases do the patent courses and distances correspond precisely with the true situation of the objects on the ground. Hence it is, that where the course or distance on the ground varies materially from that in the patent, parol evidence is admitted, not merely for the purpose of showing a corner corresponding in description with the one called for, but of proving, where it can be done, as more satisfactory, the making of such corner.

In either case it is for the jury to find from the description contained in the patent and the evidence adduced, whether the



survey or boundaries and corners as actually designated comprehend the land in question. And it often becomes necessary to decide upon presumptive evidence, as well as upon the credibility and correctness of the testimony. A patent, like every other instrument of writing, must be taken entire and applied to the ground and objects described; from which the jury are to determine whether the land claimed is the land which was surveyed or is covered by the patent. The mere circumstance of being able to show corners answering the calls of a patent, though it may be *prima facie* or presumptive evidence of the identity of the place, is not conclusive of the fact, and may be repelled by other proof.

From these remarks it follows, of course, that parol evidence in relation to the boundaries of the land, or to the place of executing the survey, although not comprehended by the courses, but answering other description contained in the patent, was correctly admitted before the jury; as was accordingly decided in the case of *Helm v. Small, Harden*, 369.

Another exception was taken to the opinion of the court, in refusing to admit, as evidence, the declaration of the surveyor, who was then dead, as to the land upon which he had executed the survey. It is not necessary to determine whether such evidence would, in general, be admissible; because it appears that the deposition of the surveyor had, by the plaintiff, been taken and filed in the cause, and afterwards withdrawn by him, with the permission of the court, to which the defendant excepted; so that, from the deposition thus in his possession, he was obviously withholding evidence of a higher and more satisfactory grade; and the court therefore properly refused proof of the declaration supposed.

It is not deemed material to notice the particular circumstances of this case. The proof, we think, furnished such ground for the verdict rendered, as to justify the court in refusing a new trial.

The judgment must be affirmed, with costs.

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In *Francis v. Haslerig*, 1 A. K. Marsh. 93, the point was determined, that parol evidence may be introduced to show the real boundaries of land to be variant from those called for in a patent or deed.

## HEAD v. HUGHES.

[1 A. K. MARSHALL, 372.]

**STATUTE INCREASING JURISDICTION.**—An act of the legislature increasing the jurisdiction of the justices of the peace and giving them exclusive original jurisdiction of all debts not exceeding a stated amount is constitutional.

**ERROR.** The opinion states the case.

*Bibb*, for the appellant.

By Court, LOGAN, J. This was an action of debt, instituted in the circuit court, upon a note for the payment of forty-five dollars. To which the defendant filed his plea in abatement to the jurisdiction of the court. To that plea the plaintiff demurred, and the demurrer having been overruled, and the plea sustained, he has brought the case before this court.

In this case we are presented with the question whether the act of the legislature giving to justices of the peace exclusive original jurisdiction of all debts not exceeding fifty dollars, is constitutional? It will be assumed as a correct position that the legislature are vested with all power of a legislative character which is not interdicted by the constitution.

To regulate the jurisdiction of our courts, and to extend or abridge the powers and duties of the members thereof, is peculiarly legislative. Unless, therefore, the exercise of this power, as respects justices of the peace, has by the constitution been restricted, it will follow that the act under consideration comes within the regular powers of the legislative department. Upon an examination of the constitution it will be seen that the only limitation in relation to the regulation of judicial cognizance, is confined to the appellate courts. The judicial power of the commonwealth is vested not only in one supreme court, with appellate jurisdiction only, but also "in such inferior courts as the general assembly may from time to time erect and establish," in county courts and in justices of the peace." But the apportionment of that power, and its regulations from time to time among those tribunals, with the restriction only against giving original jurisdiction to the court of appeals, is the mere subject of expediency, which belongs exclusively to the sphere of legislation.

An argument against this power of the legislature has been drawn from the distribution of the powers of the government into three distinct departments, confiding each to a separate

body of magistracy, and prohibiting those of one department from exercising any power properly belonging to either of the others, except in the instances therein expressly permitted. Among the exceptions to this allotment of power are attorneys at law, justices of the peace, and militia officers; who are all made eligible to the legislature. But, surely, this exception does not operate as an abridgement of power, which before, or independent thereof, properly belonged to the legislative department. If the door of the legislature has, by virtue of this exception, been partially opened to admission from the other departments, it by no means follows that the proper legislative powers of those who have obtained a regular admittance is thereby diminished. Should it be asked, What is to be done in the event of a dangerous combination of those powers in the same department? The answer is, that the correction is in other hands, not in the judiciary. It is sufficient to answer from this department that justices of the peace are made eligible to the legislature, and that the power of the legislature extends to the regulation of the jurisdiction of courts and magistrates.

Here it might be inquired, whether it is the fair presumption that, when the convention was enlarging the number from which to choose the state representation, and at the same time intending to guard against seducing from the county court some of its most useful members, it intended that their jurisdiction should remain stationary? And had that been intended, is it not probable that some restriction to legislation on the subject would have been provided? The number and dispersed situation of justices of the peace, and the great inconvenience of regular attendance by the same members in court, and the consequent uncertainty and evils from frequent changes during the same term, may have given assurances against the abuse of power by throwing into that court an excess of business, or from a dangerous combination of legislative and judicial powers in their hands. If the jurisdiction of justices could not be increased, would it not follow that legislation would be equally interdicted, both with respect to attorneys at law and militia officers? Shall militia fines, and the power and duty of courts-martial, be also stationary?

But it is contended that as justices of the courts of quarter-sessions were made ineligible to the legislature, so long as they received any compensation for their services, that, from a parity of reasoning, the spirit of the provision should be applied to

justices of the peace. The argument seems susceptible of two satisfactory answers: 1. That this provision of the constitution applies to the qualifications of representatives, and not to the limitation of legislative power; and, 2. That the making of this provision against the members of one court, and not extending it against those of the other, shows that the distinction was intended. Nor can we suppose that this distinction was unintentionally engrafted by the makers of the constitution. The presumption seems the more probable that it was founded on the different organization of the two courts, from whose respective duties and powers, which in time might be expected, greater emoluments and salaries could be sought under specious pretexts for the one than for the other, as well as from a more objectionable concentration of powers, which, in the general, were intended to be kept separate and distinct. Besides, this provision, though made when justices of the courts of quarter-sessions were vested with greater jurisdiction than justices of the peace now are; and yet, those of the quarter-sessions were made eligible to the legislature, provided they received no compensation for their services as justices. From which it would seem that it was not so much from the objection to this combination of legislative and judicial powers in those offices, as from other considerations, which induced that provision.

We are, upon the whole, of opinion that the act is constitutional; and that the judgment, therefore, of the court below must be affirmed, with cost.

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See *Beers v. Beers*, *ante*, 186, for a similar decision.

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## PATTON v. KENNEDY.

[1 A. K. MARSHALL, 286.]

**BREACH OF COVENANT OF WARRANTY, PLEADING.**—In an action for the breach of the covenant of warranty in a deed, it is not necessary to aver that the title to the land has been tried. It is sufficient to allege an eviction under a paramount and adverse title.

**SPECIAL COVENANT OF WARRANTY.**—There is a distinction between the general covenant of warranty against all persons, and a particular covenant against the acts of persons therein named. In the second case an illegal or tortious eviction by such persons is a breach of the covenant.

**RECORD IN EJECTMENT SUIT AS EVIDENCE.**—In an action for the breach of the covenant of warranty in a deed not recorded, the record of the ejectment suit is evidence to show an eviction, but nothing further.

APPEAL. The opinion states the case.

*B. Hardin*, for appellant.

By Court, *BOYLE*, C. J. This was an action of covenant upon a deed of bargain and sale, containing a covenant of warranty against all persons claiming by or under Andrew Moore, and a breach of the covenant is alleged in an eviction had by the virtue of a judgment in an action of ejectment brought by a person claiming title under Andrew Moore.

Various points were made, both in the pleadings and on the trial of the cause in the circuit court; but few of them, however, will be necessary to be decided in order to reach the justice of the case. The first we shall notice relates to the fifth plea, which was filed by the defendant, and which was adjudged on demurrer to be insufficient. That plea is certainly very inartificially drawn, and in some respects contradictory; its object, however, appears to be to deny that the title to the land had been tried in the action of ejectment.

That was a point which we apprehend was wholly immaterial. To enable a plaintiff to maintain an action upon a covenant of warranty, it cannot be necessary, in any case, to aver that the title to the land had been tried. If the action be brought upon a general covenant of warranty, it is necessary to allege that the eviction was under an adverse paramount title, and whether it is so or not will be a question to be tried in the action of covenant. It cannot, therefore, be necessary to be averred that it had been before tried. But in this case it was not even necessary for the plaintiff to allege that the title derived under Moore was a paramount title, or that the eviction under it was a legal one. Between a general covenant of warranty against the claims or acts of all persons, and a particular covenant against the claims or acts of persons therein named, there is a clear and well founded distinction; and whilst it is held that an illegal or tortious eviction is not a breach of the former species of covenant, it is clearly settled that such an eviction, if by the persons or under the claims named in the covenant, is a breach of the latter species of covenant. As the covenant in this case is unquestionably of the latter species of covenant, it follows that the plaintiff was under no necessity to aver that the eviction was under a paramount title, much less that the title had been tried. The circuit court, therefore, correctly sustained the demurrer to the defendant's plea.

The points arising on the trial of the cause, which are

thought material to be noticed, grow out of objections taken to the admissibility of evidence produced by the plaintiff.

The first objection is taken to the admission of the deed of bargain and sale declared on. The deed does not appear to have been recorded, nor was it proven by any witnesses, but as there was no pleas denying it, the plaintiff most clearly could not be required to prove its execution on the trial, before it was used in evidence. The next objection was made to reading the record of the action in ejectment. From the nature of the case the record could prove no fact material in the cause but the eviction, and of this it was admissible evidence, as has been repeatedly decided by this court. The only other objection made to the competency of the evidence, was taken to the admission of the report of a surveyor, which was attached to the record of the action of ejectment.

The report, we are of opinion, was improperly admitted as evidence. It constituted no part of the record of the suit in ejectment, not having been made so by bill of exceptions, or otherwise, nor was it proved to have been used on the trial of that suit. But the purpose for which it must have been adduced, was to establish the fact that the eviction was had under the title of Andrew Moore, and of this fact it was certainly not the best evidence the nature of the case admitted.

The judgment must, therefore, be reversed, with costs, and the cause remanded for a new trial to be had, not inconsistent with this opinion.

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It has been repeatedly determined, that to constitute a breach of a covenant of warranty, an eviction at law is not necessary. See cases holding this: *Hamilton v. Cutts*, 3 Am. Dec. 222; *Booker v. Bell*, 6 Id. 641, and *Boad v. Quattlebaum*, *ante*, 702.

As to the record in ejectment being evidence of eviction, see *Williams v. Shaw*, 7 Am. Dec. 706.

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## LEE v. DAVIS.

[1 A. K. MARSHALL, 397.]

**LAW GOVERNING INTEREST.** — The rate of interest on a promissory note should be regulated by the law as it was at the date of the note, and not by the law existing when the debt falls due, and the remedy is sought.

**ERROR.** The opinion states the case.

*Bibb*, for the appellant.

*Talbot*, *contra*.

By Court, BOYLE, C. J. This was an action by petitioner, upon a note bearing date the thirteenth of September, 1797, and becoming due twelve months thereafter. Judgment was entered by default for the principal sum, with interest at the rate of six per cent. per annum, from the time the note became due until paid.

At the date of the note the legal rate of interest was five per cent.; but before it became due, the act of assembly changing the rate of interest to six per cent. passed, and the question is, whether the law, as it was at the date of the note, or at the time it became due, should be the rule of decision, with respect to the rate of interest?

Between the right arising from a contract and the remedy to enforce it, there is a manifest distinction. The latter must of necessity, be regulated according to the law of the time and place in which it is sought; but it is a settled rule, that the former is to be governed by the law at the time and place of making the contract; and that the rate of interest, which should be allowed on a contract, relates to the right, and not to the remedy, is indisputable. It seems, therefore, to follow as a necessary consequence, that the rate of interest should, in this case, be regulated by the law as it was at the date of the note.

The other points made in the case are evidently untenable, and need not be particularly noticed.

Judgment reversed with costs, and the cause remanded, that a judgment may be entered according to the foregoing opinion.

LOGAN, J., was absent.

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An analogous decision was made in *Cox v. Mariatt*, 36 N. J. 389, where judgment was entered when the legal rate of interest was six per cent., it was held that such rate was not to be increased after the passage of an act making seven per cent. the legal rate.

See note to *Sellock v. French*, 6 Am. Dec. 185.

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## TALBOT v. BOWEN.

[1 A. K. MARSHALL, 436.]

**STATUTE OF FRAUDS AS A DEFENSE.**—To avail oneself of the statute of frauds as an objection to decreeing the specific performance of a parol contract for the sale of lands, the defendant must deny the sale or plead the statute; if he admit the sale and fail to rely on the statute, the plaintiff need adduce no proof of the sale.

**PAROL AUTHORITY TO SELL LANDS.**—The statute of frauds does not require an authority to sell lands to be created by an instrument in writing.

**INFANT AS AGENT.**—An infant may be an agent, and his contracts as such, otherwise unexceptionable, will bind his principal.

**ERROR.** The opinion states the case.

*Littell*, for the plaintiff in error.

*Pope, contra.*

By Court, OWALEY, J. This suit was brought in chancery by Bowen, to obtain a title to a moiety of a lot of ground in the town of Henderson, the equity whereof is asserted by him through a certain William Featherston, who, it is alleged, purchased it from the son and agent of Talbot.

The purchase of Featherston is admitted by the answer of Talbot, but the authority of his son to sell the land is denied; and if authorized, it is contended that owing to his son's infancy, and the inadequacy of the consideration for which the sale was made, a specific execution of the contract ought not to be inferred. On a final hearing, the court below being of opinion that Bowen was entitled to relief, pronounced a decree appointing commissioners, and ordering them to convey the lot, without making their conveyance depend upon the failure of Talbot to execute the deed.

The main objection taken to the relief sought in the bill, involves the propriety of decreeing an execution of the contract, without evidence in writing of the terms of Featherston's purchase from the son of Talbot. As the contract was for the sale of land, there is no doubt but according to the plain and obvious import of the statute against frauds and perjuries, that Talbot might have required written evidence of the terms of sale; but this, we apprehend, could have been done in no other way than by either denying of the sale, or pleading or relying upon the statute in his answer.

Upon a denial of the sale, as it would have devolved upon Bowen to have proven it, the evidence should, no doubt, to authorize a decree in his favor, conform to the requisitions of the statute; or upon the statute being either pleaded or relied on in the answer, then, as evidence of the sale should also be introduced, proof of its terms having been reduced to writing would most clearly be essentially necessary to entitle Bowen to relief.

But in the present case, as the purchase of Featherston is admitted by the answer of Talbot, and as the statute is not relied upon by him, it cannot, either for the purpose of proving the sale or taking it out of the statute, have been necessary for Bowen to introduce any evidence whatever in relation to the terms of the sale. The failure, therefore, to manifest by writ-



ing the terms of Featherston's purchase, affords no objection to the relief sought by Bowen. But as the authority of Talbot's son is expressly denied, it is also contended that evidence of his authority should not only have been introduced, but it is moreover urged that the authority should be shown to have been in writing. That to make the sale obligatory upon Talbot, his son must have been clothed with power to sell, is a proposition not to be controverted; but as respects the justice of the case, it cannot be material whether the authority was created either by writing or parol, and the statute against frauds and perjuries has never been held to require it to be in writing. And that the son was authorized, either verbally or in writing, to make the sale, from the circumstances detailed in evidence, there is no room for a moment to doubt.

And if authorized according to the settled doctrine of the law, his being an infant can afford no objection against the liability of Talbot; for although the contracts of infants are not, in all cases, binding upon them, there is no doubt but, as they may act as agents, their contracts, made in that character, if otherwise unexceptionable, will be binding upon their principal.

With respect to the inadequacy of the consideration, relied upon by Talbot, it need only be remarked that the evidence conduces satisfactorily to prove that the full value of the lot at the time of its sale was given for it by Featherston. Upon the whole, we are satisfied that Bowen is entitled to a specific execution of Featherston's purchase; but we are of opinion that it was irregular to direct the commissioners to convey, without giving Talbot a previous day to do so. For that irregularity, therefore, the decree must be reversed, with cost, the cause remanded to the court below, and a decree there entered according to the principles of this opinion.

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Referring to the doctrine of this case among others, Browne on the Statute of Frauds says, sec. 370 a: "The agent for signing may, in all cases enumerated in the fourth section, be appointed without writing, unless, of course, the memorandum to be signed is to be also sealed, in which case the power must be conferred by an instrument of equal dignity."

## CASEY v. ALLEN.

[1 A. K. MARSHALL, 406.]

**SPECIFIC PERFORMANCE, WHEN DENIED.**—To entitle to a specific performance of a contract, in favor of an assignee of a bond conditioned for the conveyance of land, on the ground of the representations of the obligor, upon which the assignee was induced to rely, it is necessary that the representations should be made deliberately, with the belief that they would be relied upon, and that they were relied upon and occasioned injury to the person confiding therein.

**ERROR.** The opinion states the case.

*Hardin*, for the plaintiff in error.

By Court, **ROWAN, J.** Casey exhibited his bill against Allen and Moore, and afterwards his amended bill. His allegations were, that he and the defendant, B. Moore, had contracted to exchange lands. He was to convey to Moore one thousand acres, in Union county, estimated in the contract at two thousand two hundred dollars; Moore was to convey to him two tracts in Bullitt county, the one of two, and the other of three hundred acres, estimated at one thousand eight hundred dollars, and to pay him four hundred dollars in horses; that Moore paid him the four hundred dollars in horses, and executed to him his bond for the conveyance of the two aforesaid tracts in Bullitt, and that he executed to Moore his bond for the conveyance of the one thousand acres in Union. Moore, at the time he executed his aforesaid bond, represented that the legal title to the two aforesaid tracts was in Joseph Brooks, of Bullitt county; that they had been sold under a decree of the Bardetown district court, and purchased at the sale by one Stephen Henderson, and assigned by him to James Terrell, and by James Terrell assigned to him, Moore; that he would procure the title as soon as he conveniently could, and convey to Casey. Moore was at that time in good credit and circumstances; complainant had then, and still has, title in and to the tract so exchanged by him.

The two aforesaid bonds (Casey's and Moore's) were proffered and made part of the bill, and bear date the fourth of May, 1804. Bernard Moore, on the twenty-seventh of that month, assigned the bond of Casey to his brother Benjamin Moore, who, on the twenty-seventh day of the ensuing June, assigned the same to the defendant, Allen, to whom Casey refused to convey until Bernard Moore should convey to him

the two aforesaid tracts, or evince a capacity and willingness to do so. Casey had in June, 1804, laid off and surveyed the one thousand acres selected by Benjamin Moore, the then assignee of his bond preparatory to a conveyance thereof. In March, 1807, Casey, by the consent and at the request of the defendant, Allen, and upon a written agreement with him that his equity should not be affected or impaired thereby, conveyed to Dempsey Waller two hundred acres out of the one thousand acre tract aforesaid, as an equivalent for the four hundred dollars which he had received in horses. Bernard Moore became insolvent and left the state without having taken any effectual means to obtain the title and convey to Casey the two aforesaid tracts of land. Allen, as assignee of Casey's bond, commenced suit thereon against Casey, who, after having made an unavailing attempt to plead the above matter in bar thereof, confessed judgment for two thousand six hundred and eighty-four dollars, reserving equity.

Allen answered the bill, stating that he knew nothing of the original contract between complainant and defendant Moore; admitted that he had as assignee of Casey's bond commenced suit and obtained judgment thereon, as stated in the bill of complaint; that he had been influenced to make the purchase of the said bond by the representation of Casey made, in June, 1804, in the woods when the tract was laid off by him for Benjamin Moore, as aforesaid; that Casey had stated to him that the title to the said tract was good, and that if he purchased the conveyance would be made at any time; that he had been paid therefor. All the material allegations of the complainant are, we think, sufficiently supported by the proof in the cause. The bill as against Bernard Moore was regularly taken for confessed.

The court below decreed Casey to convey the land, and made the injunction perpetual as to all but the costs. Casey appealed.

Two questions present themselves: 1. Was Allen induced by Casey's representations to make the purchase? and next, Has he been or is he likely to be injured thereby? As to the first, we think the character of the representations stated to have been made by Casey, too indefinite and equivocal to be much relied upon. Wilson, a witness on the part of the defendant, proves that at the time Casey was laying off this tract for Benjamin Moore, in a conversation which took place in the woods, among several persons, Casey proposed to sell some land to

Allen, that afterwards Benjamin Moore proposed to sell the tract to Allen, upon which Casey said that the tract was a good one, the title thereto safe, and that Bernard Moore had given him two thousand two hundred dollars for it; that if he bought it, he would make him the conveyance at any time. This statement was not heard by any other of the several persons who were present when Wilson represents it to have been made by Casey. The fact of its having been made is therefore very questionable. The consideration that it did not correspond with the existing facts and Casey's other conduct thereon, renders its verity still more doubtful. He had not received the consideration money; he was disinclined to convey at any time before he should receive it, else he would have conveyed to Benjamin Moore at that time.

But upon the supposition that Wilson's recollection is accurate and his veracity unquestionable, it would seem that the expressions of Casey were of a fugitive sort, uttered casually in a mixed conversation in the woods, resulting from impulse rather than reflection. But expressions of that sort which may have escaped an individual in relation to his contracts or transactions of any kind, should be cautiously received when they are to be made the basis of liability. It is the deliberate will and intention of the person uttering words, fairly inferred therefrom, and not their naked verbal import, that ought to subject him. In such case the person making the representations should be apprised by the person to whom they are made of the purpose for which they are required. They should be made deliberately, with a consciousness on the part of the person making them that they would be confided in by the person to whom they were made; and then, to subject the person making them, it must be shown by the person confiding therein that he has been injured thereby. In the present case Allen did not call on Casey, stating that he was about to purchase that bond, and wished to know if there was any difficulty in the transaction between him and Moore. Casey's attention was not called by Allen to that subject. No inquiries were made by him in relation thereto. Casey, at the time he uttered the expressions, had no reason to suppose that Allen would predicate a contract upon his confidence therein. We do not, therefore, think that either the representations or the proof of them are sufficient in this case to support a decree in favor of Allen. But suppose they were, it remains to be inquired how far Allen has been, or is likely to be, injured thereby. It is neither

alleged nor proved by Allen that the said Benjamin is insolvent, or that confiding in the representations made by Casey he has released him from his liability as assignor of Casey's bond; on the contrary, the solvency of Benjamin Moore is strongly indicated in the answer of Allen.

All the decisions of this court in cases of this class, from the case of *Jackson v. Short* up to that of *Clay v. Morrison*, indicate clearly: 1. That the representations should have been deliberately made; 2. That they should have been honestly confided in; and, lastly, that the person confiding should have sustained an injury thereby. Every case without this requisite is a case of *damnum absque injuria*, to which no relief is extended either in law or equity. The proof, moreover, in this description of case, should be clear and satisfactory; for the law will not, upon light or conjectural grounds, oblige a man to part with his freehold. Much of the reasoning upon which the statute of frauds is predicated, applies, we think, to this description of case.

It is therefore decreed and ordered, that the decree aforesaid be reversed, set aside and held for nought, that the cause be remanded, and that a decree be entered in the court below perpetuating complainant's injunction, with costs against defendant.

## SHACKELFORD v. HANDLEY.

[1 A. K. MARSHALL, 496.]

**MISREPRESENTATION OF MATERIAL FACT.**—A misrepresentation of a material fact, whether fraudulently made or not, vitiates the contract. A fact is material that influences the party in entering into the contract.

**MISREPRESENTATION BY ASSIGNOR.**—Where one assigns an obligation making the same misrepresentations as were made to him with regard to the title, he cannot recover from the assignee, although the obligor indorse on the obligation that he will perform the condition in favor of the assignee.

**MISREPRESENTATION OF TITLE.**—A vendor misrepresenting the state of the title in the thing sold, will be restrained from enforcing it, though the sale be with general warranty.

**CONTRACT WITHOUT CONSIDERATION.**—Equity will not decree the specific execution of a contract where there is no consideration.

**APPEAL.** The opinion states the case.

*Littell*, for the appellants.

*Wickliffe*, contra.

By Court, ROWAN, J. On the twenty-fifth day of March, 1796,  
AM. DEC. VOL. X—48

John Handley and Samuel Shackelford contracted, by articles of agreement, under their respective signatures and seals, to the effect following: Handley sold Shackelford three thousand acres of land, part of a tract of ten thousand acres, lying on the lower side of Rough creek, opposite to and near the town of Hartford, which he represented in his covenant to have been patented in the name of William Fullerton. He represented also that he was entitled to a moiety thereof by conveyance from the said Fullerton. Shackelford was to pay him nine hundred pounds for the said three thousand acres, and was to have the remaining two thousand acres at six hundred pounds, if after seeing the land he liked it and chose to take it. Shackelford paid him the nine hundred pounds for the three thousand acres, and after seeing the land, chose to take the remaining two thousand acres. The six hundred pounds for the two thousand acres was to be paid in seven years, with interest thereon at the rate of five per centum for the last six years, whereby he became entitled to the whole five thousand acres, for which on the thirteenth of February, 1800, Handley made him a conveyance, with covenant of general warranty, which deed of conveyance Shackelford on the next day acknowledged in writing, under his hand and seal, with a full compliance by Handley of his part of their aforesaid agreement.

On the nineteenth of May, 1800, Shackelford and Ignatius Pigman contracted by a written article, under their respective signatures and seals, to the effect following: Shackelford let Pigman have the aforesaid five thousand acres, the moiety of the ten thousand acre tract patented in the name of Fullerton, for which Pigman was to convey to him by deed, with general warranty, one thousand acres of land on Yellow creek, three thousand six hundred acres on Green river, without warranty, and to pay him one hundred pounds in cash, and a horse. Shackelford was as soon as possible to put the said Pigman in possession of all the interest he had in the said five thousand acres, with all the recourse, Pigman was to pay part of the one hundred pounds down, and the balance in eight months. He was to convey the two aforesaid tracts on demand. He paid one hundred dollars in cash, and one hundred dollars in a horse. On the back of the above article was made the following indorsement, viz:

"Sir—Please to make the deed to Ignatius Pigman, you was to make to me, and oblige. Yours,

"SAMUEL SHACKELFORD."

"Capt. JOHN HANDLEY—May 17, 1800."

And underneath the above, on the same instrument, was this other indorsement, viz:

"I do hereby agree to convey the within-mentioned moiety of five thousand acres of land to Mr. Ignatius Pigman.

"Test.—SAMUEL WORK.

JOHN HANDLEY. [L. s.]"

Pigman, some time in the next year, discovered that the aforesaid tract of ten thousand acres had never been patented; that the plat, and certificate of the survey thereof, were still lying in the register's office in the name of Fullerton, and on the tenth of August, in that year, communicated that matter in terms of much solicitude to Shackelford, with an earnest request that he should procure the emanation of the patent, as of the date when it should have been issued. On the thirteenth of June, 1803, Shackelford addressed a letter to Pigman, which is exhibited by Handley, and made part of his answer, which commences as follows: "Sir, I here again take the liberty to repeat the subject of the five thousand acres of land I formerly purchased from John Handley, and since sold to you. Handley agrees, provided I will cancel so far as relates to the two thousand acres, he will take it," etc. In this letter, Shackelford offered to give up to Pigman all the money which was due, and to give him the one thousand acres on Yellow creek, if he would come into the measure; and from this letter it appeared that Pigman had not conveyed either of the aforesaid tracts to Shackelford, or paid him the balance of the one hundred pounds.

In the fall of the year 1803, Pigman became insolvent, and left the state of Kentucky, without having canceled his contract with Shackelford or conveyed to him either of the two aforesaid tracts of land, or paid him any more money. A patent issued to Fullerton for the aforesaid ten thousand acres on the eighth day of May, 1804, and on the tenth day of July, 1804, Handley acknowledged in the clerk's office of Ohio county, before the clerk thereof, a deed of conveyance to Pigman for four thousand five hundred acres, part of the aforesaid five thousand acres, and on the twentieth day of February, 1806, conveyed to Daniel Barry five hundred acres thereof, in discharge of a bond executed for that quantity by Pigman to Walls and Joseph, and by them assigned to the said Barry. Much of the five thousand acres aforesaid was covered by older patents than Fullerton's. On the deed of conveyance from Handley to Pigman being executed, Slatler, the son-in-law of Pigman, in-

dorsed upon the articles of agreement between him and Shackelford, to the following effect, viz:

“Received of Capt. John Handley a deed for the within moiety of five thousand acres, bearing date July the fifth, 1805, and said Shackelford exonerated except he has failed in paying the taxes on the said land from the year 1795, in which case I hold him liable.

IGNATIUS PIGMAN,

“By his attorney, Stephen Slatler.”

Handley commenced suit at law against Shackelford in the Lincoln circuit court upon the article of agreement aforesaid, and obtained a verdict and judgment against him for six hundred pounds, the price of two thousand acres, with interest thereon from the twenty-sixth March, 1797. Shackelford filed his bill enjoining the judgment aforesaid, alleging in addition to the above facts that he was prevented by his misrepresentation of the title to the land, at the time he sold to Pigman, from exacting a compliance on the part of Pigman. That the misrepresentation made by him to Pigman was superinduced by the misrepresentation made by Hanley, in which he confided and by which he was influenced to make the contract with him. That Handley had not conveyed effectively the land in question either to him or to Pigman, so as to enable him to exact from Pigman the consideration agreed to be paid by him therefor. That the conveyances to Pigman and to Barry were collusive and fraudulent, made with a knowledge that he had not been paid, and that Pigman had become insolvent and fled the country.

Handley answered the bill, admitting that he had made the representations as to the title to the land, but insisted that they were honestly made, under the honest belief that the facts corresponded therewith. That the error was on his part innocent and unintentional, and that his covenant of general warranty and his capacity to comply therewith met and silenced all complaint that there were elder adversary titles to the land. He urged also that the transfer by Shackelford of his interest in the land, and of his recourse against him to Pigman, taken together with the indorsements thereon and the conveyances to Pigman and to Barry, and the acceptance of the conveyance by his agent, Slatler, had also silenced every complainant on the ground of his innocent misrepresentation of the title, and had removed all obstruction to the effectuation of his judgment against Shackelford.



The cause was removed by the consent of the parties from the Lincoln to the Mercer circuit court, and afterwards, by a judge's order, upon the petition of Handley, to the Hardin circuit court, where, after various amended bills and answers, and a revival by and in the names of Shackelford's representatives, he having departed this life, it was finally tried, and a decree pronounced dissolving the injunction and dismissing the bill with damages and costs; from which complainants prayed this appeal.

They allege that it is erroneous and unjust. That the misrepresentation of Handley in the original contract has produced an afflicting result, which ought to be sustained by him, but which, by the decree, is fastened upon them. On the other hand it is urged to be correct, on the ground that Handley, in whose favor it is, acted fairly and with good faith throughout the transaction upon which it is based. That his representation at the time of and in the contract, that the land which he sold therein had been patented in the name of Fullerton, and that he had title thereto, was made under the honest conviction that such were the facts. That he had no intention to deceive, and that as to those facts he himself was deceived.

It may be and probably is true that Handley was, at the time of the contract, unconscious that the facts of the case did not correspond with his representation of them; but the chancellor does not regard alone the motives which influenced the agent nor the consciousness under which he acted. The effects and consequences of the act are mainly considered by him in this class of cases. The act, whatever may be its character as to motive, to render the agent irresponsible should not be injurious to another. The motive of an act relates to the agent, and may be of importance in ascertaining his moral character. The act relates to the subject, and is to be considered as to its injurious effects upon him, abstractedly from the motives which led to or produced it. "*Sic utere tuo ut alienum non laedas*," is a sound maxim deduced from the associate state of man, and of extensive influence upon human transaction. You may say or do what you please if you do not thereby injure another. The circle of your rights is limited by that of the equal rights of your neighbor; when you transcend that limit you encroach upon his rights, and must answer for the encroachment to the extent of the injury inflicted thereby; and this, whatever may have been your motive, whether virtuous or vicious, the injury is the same to him in either case. Confidence between man and man is indispensably necessary to social intercourse and the

transaction of business, it is the *postulata* upon which society is constructed, and without which it could not exist even for a moment; but confidence presupposes good faith and cannot exist without it. Man is therefore constrained to confide in the statement or representation of his fellow-man in every transaction which he may have with him, and hence the necessity that the statement or representation should be correct. The injury, therefore, superinduced by an erroneous statement deliberately made must be repaired by the person making it; and this upon a principle of primary and necessary justice, otherwise all the points of social contact, instead of points of coherence, would become points of repulsion, and society would hasten to cease.

In a purchase of land in any country, and more particularly in this, where conflicting titles have afflicted the community, the purchaser, it may be reasonably supposed, would first inquire into the state of the title thereto; and would be mainly influenced in making the purchase by the representations of the vendor on that subject. It cannot be presumed that Shackelford would, in this case, have made the purchase if Handley, instead of telling him that the land was patented and that his title thereto was good, had told him that it was not patented and would not be for eight years to come, and that a great part of it was covered by adversary patents. Nor can it be supposed that Pigman would have purchased of Shackelford had these facts been disclosed to him. But the error of Shackelford, in his transaction with Pigman, was occasioned by the previous error of Hanley, in relation to the same subject, and is an error for which Handley must, on very obvious principles, be responsible.

It may be said that the acknowledgment of Shackelford that the deed made by Handley to him in the year 1800 for this land was a full compliance on his part with their agreement, and ought to absolve him from this responsibility. But this deed was made by Handley and received by Shackelford near four years before the land comprised therein was patented, and of course, passed no title; besides, it was received, and the acknowledgment aforesaid, made under the illusion as to the state of the title, superinduced by the misrepresentation of Handley in the original contract in relation thereto. It was never recorded, and Handley himself evinced by his own subsequent acts, and those, too, on which he chiefly relies in this case, that he thought it a nude act.

But it is contended that the sale from Shackelford to Pigman was virtually a transfer of Handley's obligation for the land, and nothing more; and that Handley's indorsed undertaking thereon to comply therewith released Shackelford, and left the transaction exclusively between Handley and Pigman. It must not be forgotten that this transfer by Shackelford and indorsement by Handley were made under the illusion and accompanied by the misrepresentation as to title, which prevailed when the original contract was made, and pervaded that contract. It had not then been discovered that the land had not been patented, and that it was considerably occupied by adversary patents, and that Pigman would not, on that account, perform his part of the agreement with Shackelford, and could not be compelled to do so. Handley's posture therefore, in relation to Shackelford, cannot be thereby improved, nor can his liability to him be thereby diminished, for his assumption to Pigman did not remove or diminish Shackelford's liability on account of the misrepresentations made by him as to the title of the land, at the time of his sale thereof to Pigman, nor did it remove or diminish the obstruction then resulting to his exaction of payment therefor from Pigman.

The repetition of erroneous or fraudulent acts, no matter how multiplied, by the same parties, in relation to the same subject, cannot vary or extinguish either their respective rights or liabilities. The repetition of a sin is not considered in any system of theology as an expiation thereof; not more in the eye of reason can the repetition of an offense against a government, or of an injury against an individual be said to absolve the offending person, and expiate the offense or injury. A person who has been injured by the mistake or fraud of another may, after he has become conscious thereof, absolve the offending party and affirm the transaction in which the mistake or fraud existed, and this affirmance and absolution may as well be inferred from his subsequent acts in relation to the transaction, as it may be proved in any other way; but in either and every shape of case, the inquiry is, has the party displayed an absolving or an affirming will. A person cannot well be supposed to have expressed a will or consent in relation to matters of which he had no consciousness or knowledge at the time. Indeed the exercise of will pre-supposes a knowledge by the person exercising it of the matters upon which it is exercised, and the obligation incurred by its exercise, is to be referred from the state of the

facts of which he had knowledge at the time, and must be commensurate therewith.

It cannot be supposed that Shackelford, at the time those acts were performed, intended thereby to relinquish to Pigman the consideration for which he sold him the land, or that he intended to do an act whereby his right to demand and enforce the payment thereof should be diminished or extinguished. It cannot be believed that he thereby intended to subject himself to the payment of four thousand eight hundred dollars to Handley for nothing. The conveyances afterwards made by Handley to Pigman, instead of silencing the complaints of Shackelford were calculated to aggravate them. Handley and Pigman were both residents of Ohio county; Shackelford resided in Lincoln, a county remote from that of their residence; they had all discovered the fatal error under which their contracts had been made, they had got to know that the land had not been patented to Fullerton, and Handley from the letter incorporated in his answer knew that Pigman had not paid Shackelford therefor. That letter evinces considerable zeal on the part of Shackelford, to have the matter arranged to the mutual satisfaction of all concerned by canceling their contracts or otherwise. The zeal of Shackelford was evidently a zeal not to incur but to avoid loss. The conveyance, therefore, of the land by Handley to Pigman and Barry when he knew it had not been paid for, between one and two years after Pigman had become insolvent and left the country, was, when it is considered that his misrepresentations as to the title of the land had prevented Shackelford from receiving or exacting the payment, worse than erroneous—it was fraudulent.

If the decree be sustained, Handley will receive from Shackelford four thousand eight hundred dollars, with interest on three thousand dollars thereof, from the twenty-fifth of March, 1796, and upon one thousand eight hundred dollars, the balance thereof from the twenty-fifth day of March, 1797, without any equivalent or consideration whatever. This would be against conscience and in violation of a favorite maxim in both courts, that there must be in every contract, to render it valid, a good or a valuable consideration.

The *quid pro quo* is the delight of the law; so much so, that out of the various considerations which influence human action, it has selected and considered the two foregoing only—the good and the valuable. Indeed, so adhesive is the *quid pro quo* principle, that while it will not lend its aid to the donor to

reclaim an executed gift, it refuses its assistance to the enforcement of a gift executory; it permits generosity, but exacts justice; you may be generous, you must be just. But Handley's claim to the above amount is asserted on the basis of contract, not of gift; on the basis of justice, not of generosity. If in the latter character, it must as to the two thousand dollars be most certainly unavailing. But claiming a contract, and having by his own erroneous, if not fraudulent acts, withdrawn or diverted irreclaimably the consideration upon which it was based, his claim cannot be less unavailing. The chancellor will not permit the absence of a consideration to be supplied by the artifice or cunning of a party to a contract. He will distinguish between the factitious and native complexions of the transactions which are submitted to his consideration. He will not mistake the mimicries of fraud or of art, however striking the likeness may seem for the insignia or impresses of honest realities. A sound transaction needs no artifice to recommend it, and none should succeed in recommending a wind-shaken or rotten one.

Shackelford was by contract with Handley to receive from him five thousand acres of land, as the consideration of five thousand dollars, to be paid by him to Handley. Handley had received three thousand dollars, and obtained a decree for the remaining two thousand dollars. Shackelford has not received the land or any equivalent for it, nor can he ever receive either. If the beneficial effect of this contract had become lost to Shackelford by his consent or his crime, by his own will or his own act, he should abide the loss. But if the loss has been produced neither by his will nor his act, but by the will and the acts of Handley, then Handley should sustain the loss. But even the deed which he made to Pigman was not in compliance with his contract. He was by contract to convey with covenant of general warranty. The covenant in the conveyance made is not of that character. It contains an injurious exception, not warranted by the contract, an exception of which Pigman may avail himself to refuse payment to Shackelford. The conveyance therefore is neither in compliance with his engagement to Shackelford, nor with Shackelford's engagement to Pigman. Nor can this court think that his contract to convey with general warranty excuses him for not disclosing to Shackelford, at the time of the contract, the existing adversary claims, and their character as far as he knew them. The *suggestio falsi vel suppressio veri* is as availing to resist the specific execution of a

general warranty as a special warranty contract, or to rescind the one as the other. It may not be eventually as injurious in the one as in the other, but it may be injurious in both; and when it has intervened so as to produce injury, the chancellor will refuse to enforce specifically, or will rescind without stopping to estimate the comparative extent of injury. But it is urged that the state of things is so altered in this case that there ought to be a rescission of the contract; that the chancellor will not vacate the contract unless he can place the parties *in statu quo*, which cannot be done in this case. It is true that where the injured party has by his sale or concurrent act changed the state of the affairs or the posture of the parties essentially, the chancellor will not rescind. But when the change has been produced by the sole act of the delinquent, without the concurrence in act or will of the person injured, it forms no objection with the chancellor. The change in this case was produced by Handley alone. The conveyances to Pigman and to Barry were made by him, without the consent and against the will of Shackelford, and being voluntary acts of his own, he must incur the consequences.

If it be said that he will sustain an entire loss of five thousand acres of land, it may be replied, first, that from the state of his title, and of the adversary titles thereto, it is by no means certain that the loss would be considerable; and again, that if he should sustain the loss of the whole land, it is the result of acts of his own, all calculated, and the last of them intended, to inflict a loss to that extent upon Shackelford. It is, therefore, the opinion, decree and order of this court, that the decree of the court below be set aside, vacated and annulled; and that a decree be entered up by that court, whereby the contracts between the said Shackelford and the said Handley, and the said Shackelford and the said Pigman, and the said Handley and the said Pigman, in relation to the land aforesaid, shall be respectively rescinded; and whereby the injunction of the said Shackelford shall be made perpetual, and the defendants (representatives of the said Handley) shall be decreed to pay to the said complainants two thousand eight hundred dollars, with interest at five per centum, from the twenty-fifth day of March, 1796, till paid; and whereby the conveyance for four thousand five hundred acres of land, made by Handley to Pigman shall be vacated; and whereby the said Pigman shall be decreed to pay to the representatives of the said Handley five hundred dollars, the value of five hundred acres of the land conveyed by

Handley to Barry, etc., at Pigman's request, after deducting the two hundred dollars paid by Pigman to Shackelford, with interest at the rate of six per centum from the tenth day of July, 1804, until paid; and awarding the complainants their costs in that court. And it is further decreed and ordered, that complainants recover of defendants their costs.

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### CARTMILL v. BROWN.

[1 A. K. MARSHALL, 576.]

**INTEREST ON LIQUIDATED DEMANDS.**—Upon all liquidated demands, evidenced by writing, interest accrues as matter of law; upon such demands evidenced by parol the jury may allow interest.

**APPEAL.** The opinion states the case.

*B. Hardin*, for the appellant.

*Pope*, *contra*.

By Court, OWSLEY, J. This was an action on the case brought by appellee against appellant, in the court below, to recover the amount of a check upon the branch bank of Louisville, the property of the appellee's intestate, to the use of said intestate. Upon the trial of the cause, the court, at the instance of the appellee, instructed the jury that they were at liberty to give interest upon the appellee's demand, if they chose, which instruction of the court is alleged to be erroneous, in the only error assigned by the appellant in this court.

In England, interest was allowed, as a matter of course, upon all specific sums, the claim to which was evidenced by a writing under seal. Upon the allowance of interest in cases where the sum was as specific, and had been liquidated, but evidenced by simple contract, there was a great diversity of opinion. It was sometimes allowed, and sometimes disallowed. The judges differed in opinion, and it was given or refused, according to the notion of the judge who presided, and under whose direction the jury found. But this diversity of judicial opinion was more frequent at an early period in that country than it has been in modern times; when they were governed more by their senses than their intellect; when they were more influenced by their veneration for a seal, which on many occasions they carried to a superstitious length, than by the just reasons upon which interest should or should not be allowed; when interest was given rather as an homage of respect to the

mysteriously impressed wax, than to the creditor as a premium for his forbearance. Whether the unaccountable reverence which was entertained at an early period for a seal resulted from its resemblance in figure and consistency to the wafer in the eucharist, is now a matter of curious, rather than useful, inquiry.

The commerce of that country, as it advanced, brightened the public mind, and directed it from the seal, and its representative scrawl, to principle, as the true criterion of decision. But this advance to principle was, as might be expected, gradual. Bills of exchange and promissory notes asserted, timidly at first, but repeatedly, and with various success, their claim to interest; their claim was at length fully acknowledged, and interest allowed them. They had no sooner succeeded than, it would seem, they conspired with the sealed instruments (by which they had been so long overshadowed) to conceal the true principle of their success, and assert their claim upon the ground of their being written evidences of debt. By this conspiracy, debts by parol have been frequently and unjustly defrauded. If interest be a liquidated sum allowed by statute for the forbearance of a larger liquidated sum, the former deriving its specific amount from the liquidated character of the latter, and the defined period of forbearance, can there be, in reason, any difference between the claim to interest, for the forbearance of a liquidated sum, for a given period, evidenced by writing under seal, and the like claim, for a like sum, for the same period, as evidenced by writing not under seal, or proved by parol? If a man should lend two sums of one thousand dollars each, the one to A. and the other to B., for one year; from A. he takes a bond or note for the amount, from B. he takes his word only, why, in reason, should he recover from A. one thousand and sixty dollars, and from B. only one thousand dollars? The two sums were of equal value; he was deprived of the use of both during the same period; he sustained the same damage in each case. If it is just to give the sixty dollars in the one case, is it not as just to give it in the other? If reason, or conscience, or feeling be consulted, the answer will be the same, that it is right in both cases or in neither.

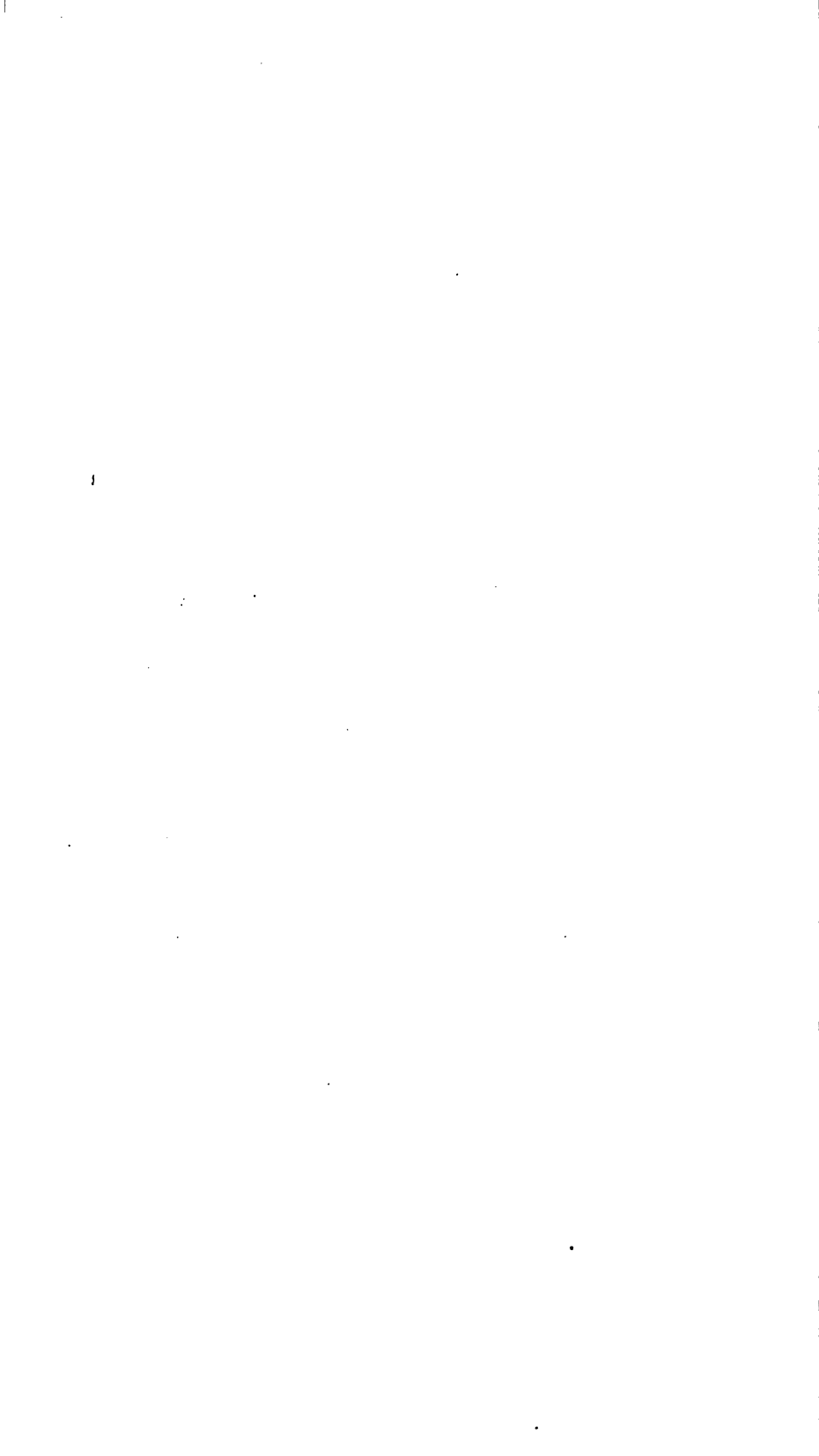
The paper, with or without the seal, is no more than the evidence of the amount due; evidence is only used to produce conviction upon the mind of the existence of facts; parol evidence will produce the same conviction; and when the same



conviction is produced the result should be the same, regardless of the character of the evidence by which it was produced. I do not pay you money because you have my bond or note for it, but because I owe it to you, and the bond or note is not the debt, it is only evidence of the debt, and I am as much bound to pay if I owe it, if you have not my bond or note, as if you have; and I am as much benefited as you, and you as much injured by forbearance in the one case as in the other.

The true principle upon which the jury may or may not find interest upon a moneyed claim by parol, may be ascertained by inquiring whether the claim, if it were evidenced by a specialty, would carry interest. If it would, the jury may and ought in conscience to allow interest. It is only upon a liquidated sum, evidenced by writing, that interest accrues as matter of law. Upon every such sum due by parol the jury may allow interest. The case in 3 Bibb, 326, 327, was a *quantum meruit* for work and labor, in which interest was refused. It does not contravene the principle above laid down, nor does the common case upon a merchant's account; they are both unliquidated claims; ascertained and liquidated then only by the verdict for the first time, and after that by our statute the interest runs. The allowance of interest is *juris positivi*, and predicated in its statutory creation upon the principles of liquidation. Its calculation as matter of course is, to be sure, confined by statute, to debts evidenced by writing, but there is no statutory inhibition of its allowance by juries upon liquidated claims in the character of damages. It is now usually allowed in all such cases: 2 Burr. 1085.

The judgment of the court below must be affirmed with costs and damages.



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## ACKNOWLEDGMENT.

**OUT OF JURISDICTION.**—A justice of the peace cannot do an official act, or exercise a judicial function, out of his district, and therefore an acknowledgment by a *feme covert*, taken in one county before a justice of the peace of another county, where the land lies, is void. *Share v. Anderson*, 421.

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**FOR MONEY HAD AND RECEIVED.**—To sustain an action for money had and received for a failure of consideration, there must be a total failure; it is not sufficient that the plaintiff gave a note for such consideration which he never paid. *Dean v. Mason*, 162.

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## ALIENS.

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1. **ARBITRATORS MUST UNITE.**—An authority given for a private purpose to a number of persons is joint, and must be strictly pursued. Accordingly, on a submission of matters to the arbitration and award of three persons, for private causes, all the arbitrators must concur in the award. *Patterson v. Leapitt*, 98.
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**PROVOCATION FOR ASSAULT.**—In an action for assault and battery, provocation cannot be given in evidence in mitigation of damages, unless it was so recent and immediate as to induce the presumption that the violence was committed under its influence; hence, acts and declarations of the plaintiff at a different time, and antecedent facts not forming part of the same transaction, are not admissible. *Lee v. Woolsey*, 230.

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2. **FRAUD BARRING CLAIM FOR SERVICES.**—An attorney after having obtained final judgment, who tries fraudulently to prevent the collection of the execution, violates his duty, so as to deprive him of his claim for services in procuring such judgment and execution. *Id.*
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### BAILMENTS.

**LIABILITY OF MILLER AS BAILER.**—Wheat was delivered to a miller, upon an agreement that he should return a given quantity of flour for so many bushels of wheat. It was held the miller was liable as a bailee, and was not a purchaser; and therefore if the wheat be destroyed by accidental fire, he will not be held responsible; and this notwithstanding the miller is not bound to return flour made from the identical wheat, but flour of a certain quality. *Slaughter v. Green*, 488.

See CRIMINAL LAW, 7.

### CONFLICT OF LAWS.

1. **LEX FORI, WHEN GOVERNS.**—In an action for breach of contract, the remedy is to be governed by the *lex fori*. Accordingly, neither the statute of limitations nor a discharge under the insolvent laws of one state, is available as a defense to the action brought in another state. *Atwater v. Townsend*, 97.
2. **LEX LOCI APPLIED.**—A claim under a contract for services made in another state, must be determined by the laws of that state. *Brckett v. Norton*, 179.

2. **LAWS GOVERNING PERSONALTY.**—The succession to personal estate is to be governed by the laws of the place where the decedent was domiciled; but to recover any part thereof it is proper that administration be granted in the place where the property is situated. *Embry v. Millar*, 732.
4. **IDEM—LETTERS TESTAMENTARY WHERE GRANTED.**—Letters testamentary should be granted according to the laws of the place where the estate of the decedent was situated at the time of his death. Accordingly, where goods are brought from one country to another, the administrator appointed in the former may act in the latter. *Id.*

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2. **IDEM.**—Such act is not void because it may impair vested rights, and although it may affect the rights of individuals, the judiciary have no authority to declare it void if it be just and reasonable, and conducive to the public good. *Id.*
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### CONTRACTS.

1. **FAILURE OF CONSIDERATION AS DEFENSE.**—In an action on a promissory note for the purchase-money of land conveyed with covenants of seisin and warranty, failure of title, or want of title in the grantor, is no defense. *Lloyd v. Jewell*, 73.
2. **IDEM.**—And where the deed contained a condition that upon breach of any covenant therein, the damages might be paid in cash to the amount received in money, and the residue by surrendering such notes given for the purchase-money as remained unpaid, in an action on one of the notes, some of them having been paid, it was held that the defendant could not show a breach of the covenant of seisin for part of the land, to the value of the note. *Id.*
3. **SUPPORTING PAUPER—IMPLIED CONTRACT.**—Where the plaintiffs furnished supplies to a pauper of the town of the defendants, but residing

with the plaintiffs, *assumpsit* will lie without proof of an actual request, or express promise, the plaintiffs being compelled by law to make the advancements. *Goshen v. Stonington*, 121.

4. **WITH ALIEN ENEMY.**—It is not unlawful, during a war, to discharge a contract with an alien enemy for the delivery of specific articles, as lumber, where the contract was made before the war, and such alien enemy has an agent, resident in the country, to receive the articles. *Buchanan v. Curry*, 200.
5. **IN VIOLATION OF LAW.**—A contract founded on an act forbidden by statute, under penalty, is void, although not expressly declared to be so, and no action lies to enforce it. *Wilson v. Spencer*, 491.
6. **IMMORAL CONSIDERATION.**—An executed contract, founded on an immoral consideration, is binding on the parties at common law. *Denton v. English*, 638.
7. **DEPENDENT COVENANTS.**—As a general rule, where one party is unable to perform his part of the contract, he is not entitled to performance by the other party. But if one has performed a valuable part of the contract, and without any fault in him is unable to perform the residue, such case might form an exception. *Johnston v. Mitchell*, 727.

See CORPORATIONS, 1; EXECUTORS, 4; INFANCY, 1; SALES, 2; SPECIFIC PERFORMANCE.

### CONTRIBUTION.

**IN EQUITY.**—When an obligation or duty rests upon several persons, *equali jure*, and to be borne equally by them, and one of them is compelled to pay a judgment obtained against him for non-performance thereof, he is entitled to contribution from the others in equity, if there has been no fraud or voluntary wrong in such failure to perform, but he must show that he is innocent of such fraud or wrong. Accordingly, one tobacco inspector may claim contribution from a co-inspector, after having paid a judgment obtained against him for non-delivery of tobacco, upon showing that the claim does not arise *ex maleficio*, but not otherwise. *Thesett v. Jones*, 538.

### CORPORATIONS.

1. **CHARTER A CONTRACT.**—A statute granting corporate powers is inoperative till it is accepted, but after acceptance, it becomes a contract. *Lincoln Bank v. Richardson*, 34.
2. **REVIVAL OF CORPORATION.**—After the expiration of the charter of a banking company, it may be revived in all its original force by a subsequent statute, which will merely revive the former corporation, and will not create it anew. *Id.*
3. **ACTIONS AGAINST—STOCKHOLDER'S LIABILITY.**—In an action against a town or other *quasi* corporation, having no corporate fund, the members of such corporation are parties, because their property may be taken to pay the debt; but if the action is against a bank or other private corporation, only the corporate property can be seized and sold, and a stockholder, not being personally liable, is not a party to the action. *Adams v. Wiscasset Bank*, 88.
4. **WHAT IS A CHARITABLE CORPORATION.**—A corporation having for its sole object the education and instruction of the deaf and dumb, supporting

and instructing indigent persons of that class gratuitously, and receiving a pecuniary compensation from pupils able to make it; deriving its means of dispensing charity from the donations of individuals and of the public, and applying its funds exclusively to the general object of the institution, is a charitable corporation. *American Asylum v. Phoenix Bank*, 112.

5. **DIVIDENDS CONSIDERED PERSONALTY.**—Dividends declared after the death of a stockholder in a turnpike company, of the tolls collected before the stockholder's decease, are personal estate, and do not pass to the heir. *Welles v. Cowles*, 115.
6. **ACCEPTANCE OF STREETS BY.**—Streets laid out by a town proprietor do not become such unless sanctioned by the corporation or its duly authorized officers. *Underwood v. Stuyvesant*, 215.
7. **SURRENDER OF CORPORATE RIGHTS.**—A corporation may be dissolved by a surrender of its corporate rights. And if a corporation suffer acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. *Sles v. Bloom*, 273.
8. **IDEM—STOCKHOLDERS' INDIVIDUAL LIABILITY.**—Pursuant to the act to establish corporations for manufacturing purposes, the defendants, in December, 1814, became a corporation, to expire in twenty years. Subsequent to December, 1817, there was no meeting of the trustees, nor any business done by the corporation; and in February, 1818, the property of the corporation, real and personal, was sold at sheriff's sale. It was held, in an action brought in April, 1819, by a creditor of the corporation, against the stockholders, to charge them individually for the debt of the corporation, in proportion to their relative shares of stock, that they were liable, the corporation having been dissolved by reason of its ceasing to act as such, and by reason of the sale of all its property. *Id.*
9. **RESOLUTION PERMITTING STOCKHOLDER TO FORFEIT STOCK.**—A resolution of a corporation, permitting the stockholders, on payment of thirty per cent. on their shares, to forfeit their stock, is void as against creditors. Where a creditor, who was a trustee of the corporation, openly protested against such a resolution, though he accepted money raised thereby, and was present at a subsequent meeting, and assented to the application of the money, it was held that such acts did not amount to a ratification of the resolution. *Id.*
10. **RELINQUISHING STOCKHOLDERS FROM FUTURE ASSESSMENTS.**—A resolution discharging from future assessments any stockholder paying fifty per cent. on his shares, is valid as to consenting creditors, and will protect such stockholders as complied with its terms before the dissolution of the corporation. *Id.*

#### CORPORATIONS—MUNICIPAL.

See PRINCIPAL AND AGENT, 5.

#### COSTS.

**ALLOWED.**—When a bill is filed for the payment of a legacy, and the defendant has no right to resist its payment, he will be liable for costs. *Glen v. Fischer*, 310.

#### COVENANTS.

1. **DEPENDENT AND INDEPENDENT.**—Where parties enter into an agreement for the sale and purchase of land at a future day, the purchaser to pay

certain installments before that day, and on that day the seller to execute a deed of conveyance, and the purchaser to pay another installment, and the balance to be paid at stated periods, and for the performance of which stipulations the parties bind themselves in a large sum, it was held, in an action to recover this penalty, that the covenants of the purchaser relating to the installments to be paid before the day for conveyance, were independent, on which recovery could be had without alleging performance, but that as to the installments to be paid on the day for conveyance, as well as to the subsequent installments, the covenants were dependent, and performance, or offer of performance, a condition precedent to the seller's right of recovery. *Bean v. Atwater*, 91.

2. **ACTS TO BE DONE SIMULTANEOUSLY.**—Where acts are to be done simultaneously, neither party to the covenant can recover without showing a performance or an offer to perform on his part. *Id.*
3. **BREACH OF COVENANT OF SEISIN.**—An administrator, under an order of sale, gave a deed, and covenanted that at the time he was well seised in fee-simple, and had a good right to sell. The premises were parcel of a farm owned and held in common by the heirs of the intestate, and others, in unequal proportions, and the deed purported to convey by metes and bounds a part of the estate held in common. It was held that no title passed, the grantor being capable of conveying only an undivided part of the whole; and therefore the covenants were broken immediately on the execution of the deed. To constitute a breach of a covenant of seisin, an eviction is not necessary. *Mitchell v. Hansen*, 169.
4. **COVENANTS IN DEED DISPLACE PAROL PROMISES.**—Parol representations at the time of execution are merged in a warranty against incumbrances, and cannot be shown in an action for the purchase-money, where they are not alleged as proof of fraud. *Share v. Anderson*, 421.
5. **EVICTON TO SHOW BREACH.**—To entitle the vendee to relief against the payment of the purchase-money, on the ground of incumbrances, an actual eviction at law need not be shown. *Id.*
6. **BREACH BEFORE EVICTION.**—Where a grantor conveyed certain land in fee, and covenanted "to warrant and forever defend the premises to the grantee, his heirs, etc., against every person whosoever lawfully claiming, or to claim, the same, or any part thereof," it was held that the grantee could maintain an action for a breach of covenant before eviction, by showing a paramount title in a third person. *Mackey v. Collins*, 586.
7. **SPECIAL COVENANT OF WARRANTY.**—There is a distinction between the general covenant of warranty against all persons, and a particular covenant against the acts of persons therein named. In the second case an illegal or tortious eviction by such persons is a breach of the covenant. *Patton v. Kennedy*, 744.

See DAMAGES, 4; PLEADINGS, 7.

#### CRIMINAL CONVERSATION.

1. **PRIOR UNCHASTITY OF WIFE.**—In an action for criminal conversation, the defendant may give in evidence facts showing previous unchastity in the wife. *Torre v. Summers*, 597.
2. **INEM—PARTICEPS CRIMINIS AS WITNESS.**—Want of chastity in the wife prior to her seduction by the defendant in an action for criminal conver-



sation, may be proved by one who has had criminal intercourse with her, if the witness do not object. *Id.*

2. **DAMAGES FOR.**—In an action for criminal conversation, the damages are in the discretion of the jury, and the verdict will not be set aside because they are excessive. *Id.*

# CRIMINAL LAW.

1. **INDICTMENT—SELLING LOTTERY TICKETS.**—A count in an indictment charging the defendant with selling a lottery ticket or tickets in a lottery not authorized by the laws of the commonwealth, is bad for generality; the name of the lottery and the number of tickets should be specified. But a count for conspiring to sell a lottery ticket or tickets in a lottery not authorized by the commonwealth is good. *Commonwealth v. Gillespie*, 475.
2. **IDEM—DISTINCT OFFENSES IN.**—The joining of several distinct offenses of the same nature in the same indictment, whether in misdemeanor or felony, cannot be objected to on demurrer or in arrest of judgment; but the court may compel the prosecutor to elect in felony on what charge he would proceed. *Id.*
3. **IDEM—CHARGING DIFFERENT PERSONS.**—Several persons may be charged in the same indictment for the same act, when it admits of the agency of several. So, also, several persons may be charged in the same indictment, in different counts, for different offenses, though the court may quash such indictment. *Id.*
4. **OFFENSE, WHERE PUNISHABLE.**—A conspirator may be convicted in the place where the overt act is done, in pursuance of such conspiracy; and one who has procured a misdemeanor to be committed, is guilty in the place where it is committed. *Id.*
5. **VARIANCE IN INDICTMENT.**—The variance in spelling a name on a lottery ticket, for the selling of which indictment is found, is fatal. *Id.*
6. **CONVICTION OF ACCESSORY IN FELONY.**—Where one is charged as accessory to a felony committed by several persons, some of whom are not proceeded against to conviction or outlawry, he may be arraigned and tried as accessory to such as have been convicted; but if he be tried, convicted, and sentenced as accessory to all, without his consent, it is error. *Stoops v. Commonwealth*, 482.
7. **LARCENY BY BAILER.**—Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*. *State v. Gorman*, 576.
8. **PERJURY — MATERIALITY OF TESTIMONY.**—To constitute perjury, the matters sworn to must be material to the issue; and although the particular fact as to which the witness is alleged to have sworn falsely need not be material *per se*, it must have a direct and immediate connection with some material fact, so as to give weight to the testimony. *State v. Hattaway*, 580.
9. **IDEM.**—Where a witness swore to a particular fact which was material, and that he was present when it occurred, and afterwards, when asked where he lived at the time, testified that he lived near the parties, which was proved to be false, it was held that this was too remote from the issue to constitute perjury. *Id.*

10. **CONSTRUCTIVE PRESENCE IN CRIMINAL OFFENSE.**—Where a person is proved to have been associated with a number of others for the commission of a crime, although he is absent when it is committed, he is to be deemed constructively present, and is therefore guilty. *State v. Heyward*, 604.
11. **FORM OF INDICTMENT FOR RIOT.**—Where, on indictment for riot against the defendant and two others named, with "divers other persons, to wit, to the number of five," without alleging that the five others were unknown, or setting out their names, and the grand jury found a true bill only against the defendant and one other, to which the defendant pleaded guilty, judgment must be arrested. *State v. McDonald*, 691.

### DAMAGES.

1. **DAMAGES FOR BREACH OF PUBLIC DUTY.**—An individual cannot maintain an action against an officer or other person for damages arising from a breach of duty to the public, without showing some special and peculiar injury to himself. *Butler v. Kent*, 219.
2. **PLEADING SPECIAL DAMAGES.**—In cases of tort, the special damages sued for must be the legal and necessary consequence of the alleged wrongful act, and must be particularly stated. *Id.*
3. **ACTIONS AGAINST MANAGERS OF LOTTERY.**—One who has purchased tickets in a lottery to sell again cannot maintain an action against the managers of such lottery for their careless, negligent and improper conduct of the same, whereby public confidence in the lottery was impaired, so that a large number of the plaintiff's tickets remained unsold and drew blanks. *Id.*
4. **DAMAGES ON EVICTION.**—On eviction by a paramount title, the damages are the purchase-money and interest. There may be cases, however, where the rents and profits, in the meantime, will take away the claim of the party to interest. *Bond v. Quattlebaum*, 702.
5. **DEDUCTION FROM PURCHASE-MONEY.**—Where the object of a purchase has been actually defeated, by reason of a particular tract of land being less than was estimated, there should be a deduction from the purchase-money; and if a gross sum is paid without setting a specific value on any particular tract, then the deduction should be in proportion to its relative value and importance, when taken in connection with the whole. *Id.*
6. **CONJECTURAL LOSS NOT CONSIDERED.**—A conjectural loss which may or may not be sustained by reducing the profits of a mill cannot be taken into consideration. *Id.*

See ARREST, 3; EXCITORS, 1; TRESPASS, 2.

### DEEDS.

1. **REFERENCE TO PLAN IN DEED.**—When a grant or deed refers to a certain plan, such plan becomes, by legal construction, a part of the deed, and is not explainable by extraneous evidence any further than it would be if actually inserted in the deed. *Kennetec Purchase v. Tiffany*, 60.
2. **PLAN GOVERNS ESTABLISHED LINES, WHEN.**—The proprietors of a tract of land had a map made of part of it, to be of a certain width, east and west, though the corners on the west side were not established, and

afterwards had a survey made of another contiguous portion, when the surveyor marked out a line as the west boundary of the first survey, putting it further west than originally intended, it was held that purchasers of lots, included in the first plan and referring to such plan, must be governed by it, and could not take to the line thus established. *Id.*

3. **CONSIDERATION OF DEED TO WIFE.**—Where a wife had, at her marriage, a large real and personal estate, which she allowed her husband to dispose of, upon his promise to settle upon her other property of equal value, and after he had partly complied with his promise, a separation having been agreed upon, he made a deed for her benefit, the consideration of which was the excess of her property so disposed of by the husband over that settled upon her, together with her release of all right of dower in his remaining property, and of all claim for future support, it was held that the deed was valid as against creditors. *Harvey v. Alexander*, 519.
4. **UNRECORDED DEED.**—A deed not recorded within the time prescribed by statute is void as against creditors; and for the purpose of determining whether it has been duly recorded, it will be presumed to have been delivered at its date, unless the contrary appears by the record. *Id.*

## DIVORCE.

**ALLEGATION OF ADULTERY.**—It is sufficient in a bill for divorce, for adultery, to charge the offense as having been committed with one or more persons unknown to the plaintiff. *Germond v. Germond*, 335.

## DOWER.

1. **IN SEPARATE TRACTS.**—Where the husband conveys to two in severalty and dies thereafter, the widow should have dower assigned out of each distinct parcel of land; and likewise if he conveys to one, and the latter convey in separate parcels to several. *Fosdick v. Gooding*, 25.
2. **ON ALIENATION.**—In case of alienation by the husband, the widow's dower is to be estimated according to the value of the land at the time of alienation. *Hale v. James*, 328.
3. **TIME OF ALIENATION.**—The husband mortgaged land without his wife joining, and continued in possession, and then released the equity of redemption to the mortgagee. The time of the release was held to be the period of alienation, when the value was to be taken without regard to any subsequent improvements made by the purchaser. *Id.*
4. **CALCULATION OF ANNUITY IN LIEU OF.**—Where it is agreed that a yearly sum shall be allowed a widow instead of having dower assigned to her according to law, the interest of one third of the value of the premises, at the time of alienation, is the proper measure of the annuity; subject, however, to a reasonable deduction as a compensation to the tenant on account of necessary repairs and the risk of loss by fire, where a house and buildings constitute the principal part of the property. *Id.*
5. **ELECTION OF WIDOW EVIDENCED BY SUIT.**—Where a widow joins as executrix in a suit for the purchase-money for land conveyed by a deed which she had defectively acknowledged, the invalidity of the deed is no bar to a recovery; for by suing she makes her election, and a recovery will bar her right to dower. *Share v. Anderson*, 421.

6. **IN COAL LANDS.**—It is not waste for a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins, or to penetrate through a seam already opened and dig into one lying under it. *Crouch v. Puryear*, 528.

#### EJECTMENT.

- RECOVERY IN, FOR MOIETY.**—After a plaintiff has obtained judgment in ejectment for a moiety of the land, he may sustain a new ejectment for the whole, against the same parties, without taking possession, or using any means to enforce the former judgment. *Rambler v. Tryon*, 444.

See EVIDENCE, 22.

#### ELECTION.

See DOWER, 5.

#### ESTOPPEL.

1. **BY JUDGMENT.**—To constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and appear from the record to have been decided. Consequently it is not an estoppel of the plaintiff's title, to produce a judgment rendered in a prior action of disseisin between the parties on the issue of *nul disseisin*, it not appearing that the question of title was involved in that action. *Smith v. Sherwood*, 143.
2. **EQUITABLE ESTOPPEL.**—Where one who has the legal title to land acquiesces in its sale by a person under a claim of title, and, moreover, advises and encourages the parties to carry out such sale, he will be estopped from asserting his title against the purchaser. *Storrs v. Barker*, 316.
3. **IGNORANCE OF LAW.**—Ignorance of the law, with a full knowledge of the facts, cannot generally be set up as a defense; nor will it protect a party from the operation of the rule in equity, when the circumstances would otherwise create an equitable bar to the legal title. *Id.*
4. **ADMISSION BY MISTAKE.**—Where, in a dispute concerning boundaries, one of the parties admits, and yields to the claim of the other through mistake, and without consideration, he will not be estopped from asserting his right, upon discovering the mistake; and generally no concealment, misrepresentation, or negligence, will work an estoppel of one's right, unless it be fraudulent, and another is thereby induced to part with something of value. *Stuart v. Luddington*, 550.

See PRINCIPAL AND AGENT, 2.

#### EVIDENCE.

1. **AS TO SANITY.**—To prove the sanity of a party at the time of his making a contract, evidence of the state of his mind before, at and after such time, is admissible. And evidence of acts of such party subsequent to the contract which tend to prove his recognition thereof, should be admitted as conducing to prove his sanity at the time when the contract was made. *Grant v. Thompson*, 119.
2. **OPINIONS AS TO SANITY.**—The mere opinions of witnesses relative to the sanity of a party are inadmissible, yet when taken in connection with the facts on which founded, they are admissible. *Id.*

3. **WHEN EVIDENCE OF FRAUD INADMISSIBLE.**—In an action on a warranty on the sale of a chattel, where there is no substantive allegation of fraud, evidence of fraud is inadmissible. *Dean v. Mason*, 162.
4. **FOREIGN LAWS.**—Foreign laws cannot be noticed judicially, but must be proved as facts; and in this respect the laws of the respective states of the Union are considered foreign. *Brackett v. Norton*, 179.
5. **PROOF OF HANDWRITING.**—The handwriting of a party may be proved by a witness, who, in the course of dealing has received notes of the party, which have been paid upon presentation, and who, from knowledge thus obtained, swears that he believes the signature in dispute to be that of the party. *Johnson v. Davenport*, 198.
6. **ATTORNEY AS WITNESS.**—An attorney or counsel may testify to a collateral fact which he has ascertained, without being intrusted with it by his client; as, for instance, to the handwriting of his client, though he became acquainted with it after the suit commenced, but not by communication with the client. *Id.*
7. **PROOF OF ADULTERY.**—Where an issue was directed to try the fact, on the allegation "that the defendant had committed adultery with one W. C. F., on or about the first day of April, 1816, in R. county," the evidence must be confined to the specific charge put in issue; and evidence cannot be given of adultery committed with any other person than the one named; although the charges in the bill are general, that the defendant had "committed adultery at divers times, with W. C. F. and others, to the plaintiff unknown." *Germond v. Germond*, 335.
8. **EVIDENCE NOT TO THE ISSUE.**—Where evidence was given at the trial of adultery committed by the defendant with other persons besides W. C. F., the verdict was set aside, and a new trial awarded, with leave to the plaintiff to amend the feigned issue. *Id.*
9. **VENDOR'S DECLARATIONS.**—A declaration by a vendor, evincing a disposition to defraud, cannot be used as evidence against him in a different and subsequent transaction with another, not then in contemplation. *Share v. Anderson*, 421.
10. **OPINIONS OF WITNESSES.**—Where a will is impeached on the ground of imbecility of the testator from childhood to his death, the opinion of other witnesses than those attesting the will, who knew him, without stating facts, is not admissible; but when the opinion is based on facts stated, it may be received as evidence. *Rambler v. Tryon*, 444.
11. **TESTATOR'S DECLARATIONS.**—In such case, the declarations of the testator, made in the absence of his wife, the devisee, showing importunity on her part and his father-in-law to procure a will, are admissible. *Id.*
12. **OPINION ON HYPOTHETICAL FACTS.**—Witnesses giving their opinion as to the capacity of a testator, founded on facts known to them, cannot in cross-examination be asked what their opinion would be on a different state of facts. *Id.*
13. **TO VARY WILL.**—Parol evidence is inadmissible to show that in drawing a will, the scrivener, through ignorance, inserted words that varied the meaning of the instrument, although such evidence may be received to explain a latent ambiguity, to rebut a resulting trust, or, in case of fraud, to annul the will. *Iddings v. Iddings*, 450.
14. **TESTATOR'S DECLARATIONS—WHEN ADMISSIBLE.**—Where a scrivener has stated in his examination that the testator furnished him with the mat-

- ter for the will, it is admissible to ask the witness on cross-examination what those instructions were, in cases where the will has been attacked on the ground of imbecility and undue influence, but solely with a view to these points. *Id.*
15. **PAROL PROOF OF CONSIDERATION.**—Where the consideration expressed in a deed is "love and affection," and "one dollar," parol proof of other valuable consideration is admissible. *Harvey v. Alexander*, 519.
  16. **TRUSTEE AS WITNESS.**—A mere naked trustee named in a deed is a competent witness in a suit to set aside such deed. *Id.*
  17. **QUESTION TENDING TO CRIMINATE.**—It is for the witness and not the court to judge whether his answer to a question will tend to criminate him; if it will form one link in the chain of testimony against him, he is not bound to answer; and the court should so instruct him as to enable him to decide understandingly. *State v. Edwards*, 557.
  18. **DECLARATIONS AS EVIDENCE.**—The declarations of persons living together as man and wife are admissible as evidence on the question of marriage, in a suit between the children and a grantee of the wife. *Allen v. Hall*, 578.
  19. **PAROL EXPLAINING DEED.**—Though a reference is made in a deed to extrinsic matter, to explain which parol evidence may be necessary, this will not authorize such evidence to be given to explain or contradict the deed itself. *S. C. Society v. Johnson*, 644.
  20. **IRRELEVANCY OF.**—To sustain an objection to evidence merely on the ground of irrelevancy, it should appear to be so beyond all doubt, for if its competency be doubtful, it should be admitted, leaving its weight to be determined by the jury. *Shannon v. Kinsey*, 705.
  21. **PAROL EVIDENCE OF BOUNDARIES.**—Parol evidence in relation to the boundaries of the land, or to the place of executing the survey, although such boundaries differ from the courses described in a patent, is admissible. *McNeil v. Dixon*, 740.
  22. **RECORD IN EJECTMENT SUIT AS EVIDENCE.**—In an action for the breach of the covenant of warranty in a deed not recorded, the record of the ejectment suit is evidence to show an eviction, but nothing further. *Patton v. Kennedy*, 744.

See SLANDER, 7; WILLS, 1, 4.

#### EXECUTIONS.

1. **"TOOLS" EXEMPT.**—Within the meaning of the statute exempting certain property from execution, apparatus for printing, as a printing press, cases and types, may be considered as "tools," if they are necessary for the upholding of life, and whether they are so or not, is a question of fact. *Patten v. Smith*, 166.
2. **MISRECITAL OF WRIT IN SHERIFF'S DEED.**—In a sheriff's deed a recital of the authority, under which the sale was made, is not indispensably necessary; and if in such deed the execution is misrecited, as having issued from one court where it is in fact issued from another, the misrecital is not fatal. *Harrison v. Maxwell*, 611.
3. **SALE OF VESTED REMAINDER ON EXECUTION.**—A vested remainder may be levied on and sold during the continuance of a preceding life-estate, and while the tenant for life is in possession. *Id.*

## EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR—RIGHT TO DAMAGES.**—Where damages are assessed by the county court in favor of the owner of land through which a public road had been laid out, to be paid when the road is opened, which event does not happen until after the owner's decease, it was held that such damages became a debt as soon as assessed, and passed to the executor. *Welles v. Cowles*, 115.
2. **EXECUTOR'S RIGHT TO ACCRUED RENT.**—In case of the lessor's death before the expiration of a parol lease for a year, the heir cannot, in an action of *assumpsit*, recover the rent accruing prior to the decease, either on the ground of express contract, or on the ground of an implied contract for use and occupation. *Id.*
3. **CONVEYANCE BY ADMINISTRATOR.**—A general power of sale, given by the court to an administrator, authorizes him to execute such an instrument as will legally convey the estate sold. *Mitchell v. Hasen*, 169.
4. **ASSIGNMENT OF CONTRACT BY ADMINISTRATORS.**—The administrators of the vendee in a contract for the sale of land, can assign the contract, or compel its performance, without the consent of the heirs. *Champion v. Brown*, 343.
5. **ACTION AGAINST ADMINISTRATORS.**—Since the power of administrators is strictly joint, they must be sued jointly, and plead jointly, and no several judgment can be taken against them. Hence, if such judgment be taken it is wholly void, and the non-payment of it is no breach of the administration bond. *Dickerson v. Robinson*, 396.
6. **CREDITOR Suing ON ADMINISTRATION BOND.**—A creditor of an intestate cannot sue on an administration bond, and assign as a breach thereof, the non-payment of his debt, even though he has obtained a judgment against the administrator upon which a *devastavit* has been returned. He may, however, sue on the bond, and allege as a breach the not rendering a true and just inventory or account, or that there has not been administration according to law, but the judgment will not be for his own debt, but for the whole penalty. *Id.*
7. **NON-JOINDER OF EXECUTORS.**—Where one sues as executor, the non-joinder of his co-executors as plaintiffs is not a ground of nonsuit, but the objection must be taken by plea in abatement. *Gordon v. Goodwin*, 573.
8. **AGENT AS EXECUTOR DE SON TORT.**—An order drawn upon an agent in possession of funds out of which it is to be satisfied, when accepted, specially appropriates the funds for that purpose, and is a good assignment thereof, so that the funds do not become assets on the death of the drawer, and the agent cannot be held liable therefor as executor *de son tort*, when he satisfies such order out of the proceeds in his hands. *Debesse v. Napier*, 658.

See CONFLICT OF LAWS, 4.

## FACTORS.

1. **SELLING ON CREDIT.**—Where a factor to whom goods are consigned for sale, generally sells them on credit to a merchant in good standing, taking a note payable to himself, and the purchaser becomes insolvent, the factor is not liable for the loss. *Greeley v. Bartlett*, 54.

2. **ADVANCES BY.**—Where a factor, in order to meet drafts drawn on him by his principal and accepted, sells the goods on credit, and takes a note payable to himself, which he indorses and sells for money, and the maker's insolvency compels the factor to pay the note, he may recover the amount from his principal. *Id.*
3. **PLEDGING GOODS.**—A factor cannot pledge his principal's goods for his own debt. But it is equally clear that when a consignee, acting within the scope of his authority, employs a sub-agent to carry that authority into execution, as by selling goods consigned to him, or doing any other act within that authority, that such sub-agent has a lien on the goods upon which he has made advances for the purposes of a sale. *Bowie v. Napier*, 641.

### FRAUD.

1. **MORTGAGOR REMAINING IN POSSESSION.**—Where a mortgagor of chattels remains in possession, and uses such property as his own, it is merely presumptive of fraud, and should be submitted as a question of fact to the jury. *Patten v. Smith*, 166.
2. **MISREPRESENTATION MADE BONA FIDE.**—One who relies upon representations untrue in fact, and suffers loss, is entitled to remuneration, although such representations were innocently made. *East v. Mathew*, 721.
3. **SALE TO HINDER CREDITORS.**—A bill of sale to hinder and delay creditors, though binding as between the parties, is void as to creditors, and purchasers with notice, as well as without notice. *Mason v. Baker*, 724.
4. **POSSESSION BY VENDOR.**—The possession by the vendor of the articles mentioned in a bill of sale is a badge of fraud. *Id.*
5. **MISREPRESENTATION OF MATERIAL FACT.**—A misrepresentation of a material fact, whether fraudulently made or not, vitiates the contract. A fact is material that influences the party in entering into the contract. *Shackelford v. Handley*, 753.
6. **MISREPRESENTATION BY ASSIGNOR.**—Where one assigns an obligation making the same misrepresentations as were made to him with regard to the title, he cannot recover from the assignee, although the obligor indorse on the obligation that he will perform the condition in favor of the assignee. *Id.*
7. **MISREPRESENTATION OF TITLE.**—A vendor misrepresenting the state of the title in the thing sold, will be restrained from enforcing it, though the sale be with general warranty. *Id.*

See ATTORNEYS, 2; EVIDENCE, 3.

### FRAUDULENT CONVEYANCES.

1. **SECRET SETTLEMENT, WHEN FRAUDULENT.**—Where a father purchased property with his own funds, but took a bill of sale to himself as agent of certain trustees for his wife and children, and kept the same secret, using the property, it was held, on a subsequent sale by him to a bona fide purchaser for value, without notice, that the bill of sale was fraudulent as to such purchaser. *Gordon v. Goodwin*, 573.
2. **VOLUNTARY DEED, WHEN INDEBTED.**—A deed is not necessarily void against a subsequent purchaser, merely because it is voluntary, and the person making it is indebted to some extent at the time. *Hudnal v. Teasdale*, 671.



2. **POSSESSION AS EVIDENCE OF FRAUD.**—Where personal property is conveyed by a husband to a trustee for the benefit of his wife and children, the subsequent possession of the husband is consistent with the object of the deed, and is no evidence of fraud in behalf of a subsequent purchaser. *Id.*

#### GUARANTY.

- OF COLLECTION.**—Where, upon sufficient consideration, one guaranteed a note made and indorsed by others, to be "good and collectible after due course of law," it was held that due diligence must be used to enforce payment, both from the makers and the indorsers, before the guarantor could be held liable, and that where no proceedings were commenced against the maker for seventeen months after the note became due, when he was discharged under the insolvent act, the guarantor was released. *Moakeley v. Riggs*, 196.

#### HEIRS.

See **REAL ESTATE**, 2.

#### HIGHWAYS.

1. **OWNERSHIP OF ROAD BOUNDING LAND.**—Where two tracts of land call for a road, as the dividing line, the owners on each side hold to the middle of the road. *Witter v. Harvey*, 650.
2. **DEDICATION OF ROAD.**—Where a person lays out a road through his own land, and for his own convenience, it is not a dedication of it to the public use, unless it leads to a market, or other public place. *Id.*

#### HUSBAND AND WIFE.

1. **SETTLEMENT ON WIFE.**—Where husband and wife sue for a legacy due the wife, a suitable provision must be made out of it for the wife before it will be decreed to be paid to the husband. *Glen v. Fisher*, 310.
2. **NECESSARIES FURNISHED WIFE LIVING SEPARATE.**—The husband is liable for the necessities furnished his wife during their separation, though the separation be by agreement, if she offer to return, and he refuses to receive her, and has provided no means for her support. *Cunningham v. Irwin*, 458.
3. **IDEM—WHAT ARE NECESSARIES.**—In such case, necessities are those things suitable to the rank and condition of the husband; and he is not liable merely for the difference between the amount she earns and the value of the necessities; he must support her himself, or pay those who do so in a reasonable manner. *Id.*
4. **WIFE'S OFFER TO RETURN.**—In an action for necessities furnished the defendant's wife living apart from him, it is competent to show that she solicited her husband to take her back as his wife, and had offered to return, but that he had refused to receive her. *Id.*
5. **IDEM—PENDING ACTION FOR DIVORCE.**—And it makes no difference whether the offer to return was made before or after a bill filed by her for a divorce. The husband is not exempted from liability to furnish his wife necessities pending an action against him for divorce. *Id.*
6. **TRESPASS BY WIFE—HUSBAND'S LIABILITY.**—A wife cannot be held liable in an action for trespass committed in the presence of, and in connection

with, her husband; for she is then supposed to be under his authority, and he alone is liable. *McKeown v. Johnson*, 698.

See DEEDS, 3.

### INFANCY.

1. **CONTRACTS OF INFANT—SURETY.**—Contracts made by an infant against his interest are void. Accordingly where an infant executed a promissory note as surety, such contract is against his interest and void. *Maples v. Wightman*, 149.
2. **DEMAND OF MONEY DUE INFANTS.**—A father of infant plaintiffs, as such, has no right to demand the money of the infants; and where they reside out of the state a guardian should be appointed in order to make a valid demand. Nor has an administrator, appointed in another state, any authority. *Williams v. Storrs*, 340.
3. **INFANT'S LIABILITY FOR NECESSARIES.**—An infant is liable on his contracts for necessities only, and then merely for their actual value, and a horse does not properly come under the designation of "necessaries." *Rainwater v. Durham*, 637.
4. **PRIVILEGE OF INFANCY, PERSONAL.**—The privilege of infancy is personal, of which no one can take advantage but the infant, or his representatives; and, therefore, though the contract of an infant made with an adult be voidable by the infant, yet it is binding on the adult. *Cannon v. Alsbery*, 709.
5. **INFANT'S PROMISE OF MARRIAGE.**—The promise of an infant to marry is in its nature beneficial, and, therefore, voidable only. *Id.*
6. **INFANT AS AGENT.**—An infant may be an agent, and his contracts as such, otherwise unexceptionable, will bind his principal. *Talbot v. Bowen*, 747.

### INJUNCTIONS.

**AGAINST TRESPASS.**—Injunctions may be granted to prevent trespasses, as well as against waste, where the mischief would be irreparable, and to avoid a multiplicity of suits. *Livingston v. Livingston*, 353.

### INNKEEPERS.

1. **ORDINARY CARE BY—QUESTION OF FACT.**—An innkeeper is liable for all losses which might have been prevented by ordinary care; and ordinary care is a question for a jury. The burden is upon the innkeeper to show such ordinary care. *Newson v. Axon*, 685.
2. **LIABILITY FOR HORSE IN STABLE.**—Where the horse of a guest was put into a stable which was very open, but which had a bar to one door, and a lock and key to the other, although the key was delivered to the servant of the guest, yet the innkeeper is liable for a horse stolen out of the stable. *Id.*

### INSOLVENT LAWS.

**DEBTS NOT DISCHARGED BY INSOLVENT ACT.**—Where a defendant has been discharged under the insolvent act from confinement, at the suit of the plaintiff, it was held, that the act did not prohibit the plaintiff suing the defendant: 1. For debts which had been paid by the plaintiff as the defendant's indorser since his discharge, but which notes were in existence at the time of such discharge; and, 2. For debts due by the defendant

to the plaintiff before the arrest and discharge, but which had not been sued on, nor on which any dividend had been received; that the law operates a discharge only as to such suits as are pending, or on the debts of those creditors (whether suing or not) who may think proper to receive a dividend. *Duncan v. Brown*, 679.

# INTEREST.

1. ON LEGACY.—A devisee of land chargeable with the payment of a legacy is liable for interest on the legacy from the time it was payable, although no payment was demanded. *Glen v. Fisher*, 310.
2. COMPOUND, WHEN ALLOWED.—Compound interest can only be allowed on a special agreement in writing, after the lawful interest has become due. The agreement, to be valid, must be prospective in its operation, as that the interest then due and payable shall carry interest thereafter. An agreement made at the time of the original contract or loan, that interest shall begin and run upon the lawful interest from the period stipulated for its payment, is not valid. *Van Benschooten v. Lawson*, 333.
3. UPON UNPAID INTEREST.—Where one gives a bond for the payment of a certain sum, conditioned to pay the interest, together with one third of the principal annually, until the whole was paid, it was held that interest was collectible on unpaid installments of interest after they became due. *Gibbs v. Chisholm*, 560.
4. AS DAMAGES BEYOND PENALTY.—In an action of debt upon a judgment for the amount of the penalty in a bond, the plaintiff may recover interest by way of damages beyond the penalty of the bond upon which the judgment was founded. *Smith v. Vanderhoef*, 674.
5. FROM DEMAND.—A note was expressed: "Due T. N. on demand, three hundred and ten dollars," etc. It was held that interest should be reckoned only from the time of demand. *Cannon v. Beggs*, 677.
6. ON BALANCE.—It is well settled that interest should be allowed on an acknowledged balance, due on an open account. *Barelli v. Brown*, 683.
7. ON LIQUIDATED DAMAGES.—Interest may be recovered upon account for money had and received, and in all cases of certain or liquidated damages. *Id.*
8. STOPPED BY VENDOR'S ACT.—If the purchaser were really and *bona fide* ready to make payment and intended to do so, but was prevented from so doing by the act of the vendor, the latter will not be entitled to interest. *Hart v. Brand*, 715.
9. LAW GOVERNING.—The rate of interest on a promissory note should be regulated by the law as it was at the date of the note, and not by the law existing when the debt falls due, and the remedy is sought. *Lee v. Davis*, 746.
10. ON LIQUIDATED DEMANDS.—Upon all liquidated demands, evidenced by writing, interest accrues as matter of law; upon such demands evidenced by parol the jury may allow interest. *Cartmill v. Brown*, 763.

# JUDGMENTS.

1. OF ANOTHER STATE—JURISDICTION.—In order that a judgment obtained in another state should be conclusive and unimpeachable in every other

state, the court pronouncing the judgment must have had jurisdiction; and such judgment is of no validity where the person had no legal notice to appear, and where, in fact, there was no appearance. *Aldrich v. Kenney*, 151.

2. EVIDENCE OF WANT OF JURISDICTION.—Although the record of such judgment states the appearance of the defendant by his attorney, evidence is admissible showing that he had no legal notice and did not appear. *Id.*
2. JUDGMENT OF SISTER STATE, EFFECT.—A judgment fairly obtained in another state is conclusive evidence of a debt, and since it is a debt of record, *assumpsit* will not lie thereon. *Andrews v. Montgomery*, 212.

### JURISDICTION.

1. COURTS OF LIMITED JURISDICTION.—If a court of limited jurisdiction issues illegal process, or takes cognizance of a cause without having jurisdiction of the person of the defendant, the proceedings are void, and if the magistrate attempts to enforce the judgment or decision, he is a trespasser, and the party affected may show collaterally that the magistrate had not jurisdiction of his person at the time of pronouncing such judgment or decision. *Bigelow v. Stearns*, 189.
2. STATUTORY JURISDICTION STRICTLY PURSUED.—Where a new power is conferred on a magistrate by statute, it must be pursued in the mode prescribed. Accordingly, where a state authorized justices of the peace to cause to be brought before them persons accused of certain immoral conduct, and upon proof, to proceed to conviction, it was held that judgment pronounced against an alleged offender in his absence, after personal service of the summons, and though his father, as his guardian, appeared for him, was void. *Id.*

See CONSTITUTIONAL LAW, 3, 5, 6; JUDGMENTS, 3.

### JURY.

1. RIGHT OF POLLING.—A defendant has not a right, either in a criminal or civil case to have the jury polled; this is a means which the court sometimes takes for its own guidance, but when the court is fully satisfied, it will not resort to it. *State v. Allen*, 687.
2. FUNCTION IN PROSECUTION FOR LIBEL.—In prosecutions for libel, the intention with which the publication was made, as well as the fact of publication and the truth of the innuendoes, are involved in the general issue, and the whole case, law and fact, is determined by a general verdict. *Id.*

See CONSTITUTIONAL LAW, 3, 6.

### LARCENY.

See CRIMINAL LAW, 7.

### LEGACIES.

To WIFE ABATES, WHEN.—Where a testator gave his wife a legacy in lieu of dower, having no dowable estate either then or afterwards, and there was not sufficient property to pay all the legacies, it was held that the wife's legacy must abate with the rest; and that the fact that there was

no dowerable estate at the making of the will, or afterwards, could be proved before the will. *Perrins v. Perrins*, 302.

See INTEREST, 1.

### LICENSE.

**RESIST UNDER PAROL.**—Where the owner of land, for a valuable consideration, gives a parol license to another to build a bridge on the land, an action of trespass will lie against him for removing the bridge without the consent of the party who erected it. *Richer v. Kelly*, 38.

### LIENS.

1. **IN FAVOR OF HEIRS.**—Where land is decreed to one heir, by order of the court, the purchase-money due the other heirs is a lien on the land; but a release by the children of one of these heirs who is dead, is binding in equity, and on every one except creditors, at law. *Share v. Anderson*, 481.
2. **VENDOR'S LIEN UPON REALTY.**—Where an absolute conveyance is made of land, a receipt given for the purchase-money and possession delivered to the vendee, part of the purchase-money being paid and the bond of the purchaser, with a surety taken for the residue, the vendor has not a lien for the residue against judgment-creditors of the vendee whose judgments are subsequent to the conveyance, although they may have had notice that a portion of the purchase-money still remained unpaid. *Kaufelt v. Bower*, 428.

### LOTTERIES.

See CRIMINAL LAW, 1.

### MALICIOUS PROSECUTION.

1. **PROBABLE CAUSE SUFFICIENT.**—The essential foundation of an action for malicious prosecution is the want of probable cause, and if such cause existed the action will not lie, however malicious the motives of the prosecutor may have been. *Ulmer v. Leland*, 48.
2. **PROBABLE CAUSE, HOW DETERMINED.**—The existence of probable cause is a mixed question of law and fact; the jury must find the facts relied on, and the court will determine whether they constitute probable cause or not; and, in general, such conduct on the part of the accused as will warrant the inference that the prosecution was undertaken from public motives will be held to be probable cause. *Id.*

### MANDAMUS.

1. **WHEN DOES NOT LIE.**—A writ of *mandamus* never lies to restore to a private office, nor to execute a private right, nor where there is another specific remedy, nor where satisfaction equivalent to specific relief may be had in an action on the case. *American Asylum v. Phoenix Bank*, 112.
2. **A PROSPECTIVE REMEDY.**—The writ of *mandamus* is prospective merely, accordingly, where redress for the past privation of a right as well as restoration in future is sought, a bill in equity is the proper remedy. *Id.*
3. **TO CONTROL DISCRETION.**—*Mandamus* lies, when there is no other legal remedy, to compel an inferior tribunal to obey the law by exercising a discretion confided to it, but not to control such discretion. Hence,

where the supervisors of a county refuse to allow a claim which is a legal charge against the county, they may be compelled by *mandamus* to admit and act upon such claim as such charge, but not to allow any particular sum thereon. *Hull v. Supervisors*, 223.

### MARRIAGE.

1. **PROOF OF.**—Evidence that two persons have lived together as man and wife is presumptive proof of a marriage, which may be rebutted, but is conclusive if not rebutted, and this is a question for the jury. *Allen v. Hall*, 578.
2. **VALID CONTRACT OF.**—To make a binding contract of marriage, it should be expressed *per verba in presenti*; but there is a distinction between a contract of marriage and a contract to marry, for the breach of the latter, though expressed *per verba in futuro*, an action will lie. *Casson v. Alsbury*, 709.
3. **ALLEGING PARENT'S CONSENT.**—An infant plaintiff, in an action for the breach of a promise to marry, need not allege the consent of parent or guardian to marriage, as such assent affects only the solemnization. *Id.*

See INFANCY, 5.

### MISTAKE.

See ESTOPPEL, 4.

### MORTGAGES.

1. **NATURE OF CONDITION IN.**—The condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. Accordingly, where the condition of a mortgage deed was that the mortgagor should pay all notes which the mortgagee might indorse or give for the mortgagor, and all the receipts which the mortgagee might hold against the mortgagor, such mortgage was held void, as against the creditors of the mortgagor. *Pettibone v. Griswold*, 103.
2. **DEED OF TRUST AS MORTGAGE.**—Where a conveyance of real estate is made by a debtor to his creditor in trust, to satisfy the debt out of the proceeds, it will be construed a mortgage to which the right of redemption is incident; but if a sale is made under the deed, relief will not be granted against such sale, unless the purchaser is made a party to the suit. *Channing v. Coe*, 530.

See FRAUD, 1; PARTNERSHIP, 5.

### NECESSARIES.

See HUSBAND AND WIFE, 2, 3; INFANCY, 3.

### NEGOTIABLE INSTRUMENTS.

1. **PAROL GUARANTY BY INDORSER.**—Where the defendant, after he had been discharged from his liability on a promissory note, by the laches of the plaintiff, the holder, promised the plaintiff by parol to pay the note if he would forbear to sue the maker, such promise was held void within the statute of frauds. *Peabody v. Harvey*, 103.
2. **PLACE OF PAYMENT OF NOTE.**—If no place of payment is specified in a note, payment must be demanded of the maker personally, or at his

residence, in order to charge the indorser. *Woodworth v. Bank of America*, 239.

3. **ALTERATION OF PLACE OF PAYMENT.**—An alteration in the place of payment of a note by the maker, without the indorser's consent, discharges the indorser. Accordingly, where the maker of a note, which was indorsed in blank for his accommodation, afterwards, without the indorser's knowledge, put a memorandum on the note, making it payable at a particular bank, and payment was demanded at the bank, it was held that this was a material alteration of the contract, and that the indorser was discharged. *Id.*
4. **ALTERATION OF DATE OF NOTE.**—A promissory note, the date of which has been altered without the consent of the indorser, is thereby rendered void, though in the hands of an innocent indorsee. *Stephens v. Graham*, 485.
5. **DRAWER ENTITLED TO NOTICE, WHEN.**—The drawer of a bill of exchange is entitled to have payment demanded of the drawer, and notice of non-payment given to himself, unless there is a total absence of effects in the drawer's hands from the date till the time of payment. Accordingly, if the drawer has funds in the drawee's hands at the date of the bill, but draws them out before it becomes due, unless it appears to have been done for the purpose of defeating the bill, or unless he knew that the funds were exhausted, demand and notice are not dispensed with. *Edwards v. Moses*, 615.
6. **PROMISE BY INDORSER AFTER MATURITY.**—Where an indorser promises to pay a note with full knowledge that he has not received due notice of demand upon the maker, such demand will be presumed. *Hall v. Freeman*, 621.
7. **DEMAND AND NOTICE AFTER MATURITY.**—Where a note is indorsed after maturity, demand must be made of the maker, and notice of non-payment must be given to hold the indorser. *Peole v. Tolleson*, 663.

See GUARANTY.

#### OFFICERS.

1. **TRESPASS AGAINST JUDGE.**—If a justice of the peace, before whom an offender against the riot act, arrested on view, is brought, make an order, without a previous complaint in writing, requiring the offender to be bound over for trial, and on his refusal to comply with such order, commit him to prison, such justice, having exceeded his jurisdiction, will be liable in trespass for false imprisonment. *Tracy v. Williams*, 102.
2. **CLERGYMAN'S ACT AS A PUBLIC OFFICER.**—A clergyman in the administration of marriage is a public civil officer, and his acts in the celebration of marriage are admissible as *prima facie* evidence of his official character. *Goshen v. Stonington*, 121.
3. **JUDICIAL LIABILITY.**—A judicial officer is not liable for an injury occasioned by an error of judgment on his part, in proceedings before him. *Reid v. Hood*, 582.

#### PARTNERSHIP.

1. **SUBMISSION TO AWARD BY PARTNER.**—Though one partner cannot bind his copartner, by a writing under seal, to submit to an award, yet if after the award is made such partner accepts the amount awarded and in-

- doeses a receipt in full on the award, it bars the copartnership claim, being in the nature of a release, or an accord and satisfaction. *Bucknase v. Overy*, 200.
2. **PARTNER'S POWER TO BIND FIRM AS SURETY.**—A partner has no power to bind his copartners, without their assent, by signing the firm name as sureties on the note of a third person, and the burden is on the creditor to prove the assent. *Foot v. Sabia*, 208.
3. **RATIFYING PARTNER'S CONTRACT.**—One partner or member of an association cannot execute a deed or writing under seal so as to bind his copartners without express authority therefor; but such authority may be given by parol. However, if by their subsequent acts, the copartners ratify a contract made without such authority, they will be compelled to contribute ratably to any damages that may have been recovered at law on such contract against the partner executing it. *Skinner v. Dayton*, 286.
4. **PERSONAL LIABILITY OF PARTNER.**—Where a partner undertakes to bind his copartners by an instrument in writing, without express authority, he will be personally liable on such contract. *Id.*
5. **MORTGAGING REALTY OF.**—Where a partner mortgaged his interest in partnership premises to a *bona fide* mortgagee, without notice of any existing partnership debts, it was held that the mortgagee could hold as against creditors of the partnership. *McDermot v. Lawrence*, 463.
6. **WHAT CONSTITUTES A PARTNER.**—To charge a person as a partner it must appear, either that he has permitted the use of his name as one of the firm, to give it credit, or that he has shared in the profit or loss. *Osborne v. Brennan*, 614.
7. **PARTNERS, WHO ARE.**—Where two or more persons unite in business, one contributing money and the other labor, the profits to be divided between them, such union is a partnership. *Miller v. Hughes*, 712.
8. **AGREEMENT TO SHARE PROFITS.**—One who shares in the profits of a partnership must also share the losses. *Id.*
9. **PARTNER'S PRIVATE INSTRUCTIONS.**—Partners have equal authority over the partnership affairs, and one cannot, by any private instructions, limit the power of the other to bind him in a partnership transaction. *Id.*
10. **LIABILITY AS PARTNER.**—Persons who by their dealings with others, and in other respects hold themselves out to the world as partners, will be liable as such, notwithstanding private articles of dissolution of partnership entered into between the parties. *Spears v. Toland*, 722.

#### PAYMENT.

- BY NOTE.**—The liquidation of an account by a note, though by a note of a third person, unless expressly received in payment, does not discharge the open account. *Barelli v. Brown*, 682.

#### PERJURY.

See CRIMINAL LAW, 8, 9.

#### PERSONAL PROPERTY.

See CORPORATIONS, 5.



## PLEADING AND PRACTICE.

1. **JOINDER IN ACTION—PLEADING.**—Tenants in severalty of distinct parcels of land cannot be joined in a writ of dower. In dower, several tenancy must be pleaded in abatement; non-tenure may be also pleaded in bar. *Feedick v. Gooding*, 25.
2. **PLEADING TENDER OF SPECIFIC ARTICLES.**—A plea of tender of specific articles must state that they were kept ready until the uttermost convenient time of the day of payment. *Aldrick v. Albee*, 45.
3. **PLEADING CONSIDERATION IN ASSUMPSIT.**—Though in *assumpsit* it is sufficient to state only those parts of a contract, for the breach of which recovery is sought, yet the whole consideration must be explicitly and correctly stated. *Curley v. Dean*, 140.
4. **VARIANCE IN ACTIONS ON CONTRACT.**—In an action on a contract, the one set forth on the record and the one proved must agree in substance and effect. And in the case of mutual executory promises, a trivial variation in setting out the contract is fatal. *Id.*
- [5. **NOTICE OF TAKING DEPOSITION.**—An order permitting a party to take a deposition "on reasonable notice," is good, if such has been the practice of the court. *Cunningham v. Irwin*, 458.
6. **PLEADING—HUSBAND, DEFENDANT.**—Where the trespass is committed by the wife alone, the husband must be joined in the action; but the declaration must state that it was so committed by the wife. *McKeown v. Johnson*, 693.
7. **BREACH OF COVENANT OF WARRANTY—PLEADING.**—In an action for the breach of the covenant of warranty in a deed, it is not necessary to aver that the title to the land has been tried. It is sufficient to allege an eviction under a paramount and adverse title. *Patton v. Kennedy*, 744.  
See EXECUTORS, 7; SLANDER, 1.

## POWERS.

- NAKED, REVOCABLE.**—Where the defendant, who receives for collection a note in favor of the plaintiff's debtor, the proceeds of which the debtor directed to be paid to his creditors, promised the plaintiff in consideration of his forbearing to sue the debtor, to pay the proceeds to him, it was held that the power given to the defendant was revocable, and that he was not liable in action for money had and received, it appearing that before the note had been collected, the debtor directed the defendant to pay the sum when collected to a particular creditor, which the defendant did. *Peabody v. Harvey*, 103.

## PRINCIPAL AND AGENT.

1. **PUBLIC AND PRIVATE AGENTS.**—Where a duly authorized public agent enters into a contract on behalf of the government, but affixes his own name and seal to it, it is nevertheless the contract of the government and not of the agent. But if the principal is a private person or corporation, the contract must be executed in the name and under the seal of such principal in order to bind him; and if the agent puts his own name and seal to it, he will be personally bound, though he describes himself in the body of the contract as acting for his principal, for this is mere *descriptio personæ*. *Stinchfield v. Little*, 65.

2. **ANTE-DATING POWER OF ATTORNEY, ESTOPPEL BY.**—If a principal dates back a power of attorney to legalize a prior act of the attorney, he is estopped from showing that it was executed subsequently. *Miliken v. Coombs*, 70.
3. **SUBSEQUENT RATIFICATION OF ATTORNEY'S ACT.**—Where an attorney appointed by parol executes a bond in the name of the principal, and afterwards the principal gives him a regular power of attorney dated prior to the bond, this is a good ratification of the bond. *Id.*
4. **PERSONAL LIABILITY.**—Whenever a person undertakes to stipulate for another by an instrument under seal, without authority, or beyond it, he is liable personally on the contract, and this, notwithstanding he describes himself in his representative character. *Mitchell v. Hasen*, 169.
5. **CONTRACT BY AGENTS OF MUNICIPAL CORPORATION.**—Where a committee of a municipal corporation, describing themselves as such, made a contract for the survey of the city, and affixed thereto their individual signatures and seals, and the corporation had recognized their authority, it was held that the committee were not personally liable on the contract, but that the remedy was *assumpsit* against the corporation, the contract not being under the corporate seal so as to sustain an action of covenant. *Randall v. Van Vechten*, 193.
6. **AGENT'S LIABILITY FOR MONEY RECEIVED.**—An attorney, or agent, who is authorized to sell land, and to collect money on a bond or mortgage, should keep the money received, ready to be paid over to the party entitled to it. He is not liable for interest on the moneys of his principal, unless in default, or unless he has made use of the money for his own profit. *Williams v. Storrs*, 340.
7. **PRINCIPAL'S RESPONSIBILITY CRIMINALLY.**—A principal is liable criminally for those acts of his agent in which he participated, and such participation may be shown by circumstantial evidence. *Commonwealth v. Gillespie*, 475.

See EXECUTORS, 8; INFANCY, 6.

#### REAL ESTATE

1. **GRANTING LOTS ON UNACCEPTED STREETS.**—Where a proprietor of a tract of land in a city, laid off streets therein, which were never accepted by the corporation, and leased lots bounded on such streets, and afterwards the proper authorities established streets through said tract without reference to those thus laid out, it was held that the proprietor was not bound to keep open the streets mentioned in his leases, if the lessees had a reasonable and convenient way to a public street or highway. *Underwood v. Stuyvesant*, 215.
2. **CONTRACT FOR SALE OF LAND—RIGHT OF HEIRS.**—When a contract is made for the purchase of land, it descends to the heirs of the vendee as real estate; and they have a right to demand the discharge of the contract by the administrators out of the personal estate. *Champion v. Brown*, 343.
3. **VENDOR'S RIGHT IN CASE OF ASSIGNMENT.**—Where the vendee assigns the contract, and the assignee takes possession of the land, the vendor, though he has no right of action against the assignee for the purchase-money, may, however, by virtue of his lien on the land, call upon him to pay the money, or to surrender the land, or to have it sold in satisfaction of the lien. *Id.*

4. **ADVERSE POSSESSION UNDER STATUTE OF LIMITATIONS.**—The possession that will give a title under the statute of limitations, must be an actual occupancy, definite, positive and notorious. Hence, the occasional cutting of timber, and the exercise of other acts of ownership, such as men are accustomed to use over woodland, is not such a possession. *Bailey v. Irby*, 609.
5. **LAND SOLD BY METES AND BOUNDS.**—As a general rule, when a person sells land by the metes and bounds of an original grant, if the purchaser gets all the land embraced by that grant, he has no cause of complaint, except where there is a special covenant, or some willful misrepresentation. *Bond v. Quattlebaum*, 702.
6. **ADVERSE POSSESSION UNDER DIFFERENT TITLES.**—To bar the plaintiff's claim to realty, it makes no difference whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor does it make any difference whether the possession be held by the same or by a succession of individuals, provided the possession be a continued and uninterrupted one. *Shannon v. Kinny*, 704.
7. **CHANGING ADVERSE TO FRIENDLY POSSESSION.**—An agreement not legally binding cannot change an adverse into a friendly and united possession. A mere parol agreement by the tenant to buy the adverse title of the plaintiff's lessor will not stop the statute of limitations from running. *Daniel v. Ellis*, 707.
8. **ACTUAL POSSESSION OF PART.**—Where one has been in possession of the land in controversy for the statutory time, the plaintiff will be barred as to the whole tract, although the land had not been all used or occupied by an actual inclosure during that period. *Id.*
9. **IMPROVEMENTS BY BONA FIDE HOLDER.**—Equity will compensate the possessor of realty for improvements thereon, made *bona fide* under the belief that the land was his own. But one who takes possession without title and bestows labor upon lands, knowing them to belong to another, is not entitled to compensation. *Barlow v. Bell*, 731.
10. **LAND SOLD BY THE ACRE.**—Where a number of acres of land, part of a large tract, is sold at a certain sum per acre, and the deed does not contain the words "more or less," equity will relieve, if, upon a resurvey, there is discovered an unusual excess or deficit. *Whaley v. Elliot*, 737.

See STATUTE OF FRAUDS, 4, 5.

#### REPLEVIN.

**FOR GOODS SEIZED.**—Replevin will not lie for goods seized upon a warrant issued by an officer under the patrol law. *Gist v. Cole*, 616.

#### RIOT.

See CRIMINAL LAW, 11.

#### SALES.

1. **DELIVERY OF SPECIFIC ARTICLES, PLACE OF.**—If no place of delivery is mentioned in a contract to deliver specific articles at a day certain, the creditor has the right to appoint the place. *Aldrich v. Albee*, 45.
2. **RESCISSON BY VENDOR.**—A vendor cannot rescind a contract of sale and reclaim the goods on the ground of fraud, unless it appears that he was

induced to part with such goods by deceptive assertions and false and fraudulent representations of the vendee; and the fact that the vendee was insolvent, and the goods liable to immediate attachment by his creditors, which was unknown to the vendor, is no ground for rescission. *Cross v. Peters*, 78.

3. **NO WARRANTY FROM SOUND PRICE.**—The sale of a chattel for the price of a sound article of that description, will not amount to a warranty that such article is sound and merchantable. *Dean v. Mason*, 162.
4. **RIGHT OF ACTION FOR UNSOUNDNESS.**—To entitle a purchaser to maintain an action against the seller for unsoundness in a chattel sold, there must be either fraud or express warranty. *Id.*
5. **IMPLIED WARRANTY AS TO QUALITY OF SLAVE.**—Although the rule has been adopted in South Carolina, following the civil law, that a sound price implies a warranty of soundness, yet the rule requires limitation, and cannot extend to the moral qualities of a slave. *Smith v. McCall*, 666.

#### SHERIFFS.

1. **SHERIFF NOT DISQUALIFIED TO SERVE PROCESS.**—A sheriff who is a member of a banking corporation, may serve process thereon, because, not being personally liable, he is not a party to the action. *Adams v. Wisconsin Bank*, 88.
2. **PRESUMPTION OF PERFORMANCE OF DUTY.**—The presumption is that official duty has been regularly performed, until the contrary appears. Hence, where a deputy sheriff had an execution against a party, returnable in February, and in March following, the debtor sold a pair of horses which he had in his possession at the delivery, and on the return day of the execution, and the deputy sheriff afterwards took and sold the horses under the execution, it was held in an action of trespass against him, that it would be presumed, in the absence of proof to the contrary, that he had lawfully levied upon the property before the return day. *Hartwell v. Root*, 232.

See EXECUTIONS, 2

#### SLANDER.

1. **VARIANCE IN.**—The words charged were that "the plaintiff had had a bastard child;" and the words proved were: "If I have not been misinformed, the plaintiff had a bastard child." It was held no variance. *Treat v. Browning*, 156.
2. **MITIGATION OF DAMAGES.**—Reports in circulation that the plaintiff had been guilty of the crime charged, may be given in evidence by the defendant as evidence of character to mitigate damages. *Id.*
3. **EVIDENCE TO JUSTIFY NOT ADMISSIBLE.**—Evidence on the general issue without notice, for the purpose of mitigating damages, which amounts to a justification of the charge, is not admissible. *Id.*
4. **WORDS ACTIONABLE PER SE.**—To say of another, "You got to bed with Sarah M.," is actionable *per se*; so, also, "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being continually riding them;" and "He has committed fornication," although the person to whom the words referred may have been a married man. *Walton v. Singleton*, 472.

6. **CONSTRUCTION OF WORDS IN SLANDER.**—In an action of slander the words are to be construed as they were, or should have been, understood by the person to whom they were addressed. *Sawyer v. Esfort*, 632.
6. **IMPUTING FELONY BY A QUESTION.**—A charge of felony may be made by a question as well as by a direct allegation, if it was so meant, and this is a question of construction. *Id.*
7. **EVIDENCE OF CHARACTER IN SLANDER.**—In an action of slander, evidence of the plaintiff's general bad character, but not of a particular criminal act other than that imputed to him, is admissible in mitigation of damages. *Id.*

#### SPECIFIC PERFORMANCE

1. **OF CONTRACT OF SALE.**—Specific performance of a contract at auction will be decreed, where the sale is *bona fide*, the title good, and the quantity of land the same, and the description substantially true, although it may vary in a slight degree. *King v. Bardeau*, 312.
2. **IDEM—SLIGHT VARIATION.**—When two adjoining lots of land were sold together, in one parcel, for one price, and on one of the lots were buildings, which projected two feet on the other lot, it was held that this was not so material a defect in the subject, or variation from the terms of the description at the sale, as would entitle the purchaser to abandon the contract. *Id.*
3. **COMPENSATION TO PURCHASER.**—Where the purchaser cannot by the use of ordinary diligence discover a defect in land sold, and is misled by the advertisement of sale, he is entitled to compensation for any diminution of value arising therefrom, to be deducted from the price. *Id.*
4. **OF INDEMNITY.**—When administrators make an agreement with one to whom a contract is assigned, that he shall indemnify and save them harmless, etc.; the administrators are entitled to a specific performance of the covenant; and a want of personal estates cannot be set up against the relief sought. *Champion v. Brown*, 343.
5. **OF PAROL CONTRACT DENIED.**—A mere oral promise to convey a certain tract of land to a son in consideration of blood and affection is not sufficient to warrant a decree of specific execution, even in favor of a purchaser from the son. *Hickman v. Grimes*, 714.
6. **WHEN DENIED.**—It is a general rule that if an action at law will not lie upon a contract to recover for its breach, equity will not decree its specific execution. *Id.*
7. **WHEN DECREEED.**—Whether the performance of a contract should be specifically decreed, depends upon the circumstances of the case. Accordingly, where the purchaser, in a contract for the sale of land, has with good faith shown a willingness and readiness, without injury to the vendor, to perform substantially the agreement, he will be entitled to the aid of a court of equity. *Hart v. Brand*, 715.
8. **OF ENTIRE CONTRACT.**—Where a contract is entire, equity will decree an entire performance or a total rescission; it cannot rescind as to a part and affirm as to the residue which has been performed. If the rights of third persons are involved, the parties must be left to their remedies at law. *Johnston v. Mitchell*, 727.
9. **STATUTE OF FRAUDS AS A DEFENSE.**—To avail oneself of the statute of frauds as an objection to decreeing the specific performance of a parol

contract for the sale of lands, the defendant must deny the sale or plead the statute; if he admit the sale and fail to rely on the statute, the plaintiff need adduce no proof of the sale. *Talbot v. Bowen*, 747.

10. **WHEN DECREED.**—To entitle to a specific performance of a contract, in favor of an assignee of a bond conditioned for the conveyance of land, on the ground of the representations of the obligor, upon which the assignee was induced to rely, it is necessary that the representations should be made deliberately, with the belief that they would be relied upon, and that they were relied upon and occasioned injury to the person confiding therein. *Casey v. Allen*, 750.
11. **CONTRACT WITHOUT CONSIDERATION.**—Equity will not decree the specific execution of a contract where there is no consideration. *Shackleford v. Handley*, 753.

#### STATUTES.

1. **CONSTRUCTION OF PENAL STATUTES.**—Penal statutes are to be expounded strictly against an offender and liberally in his favor; it is not sufficient that the offense is within the mischiefs intended by the legislature to be redressed, if not within the words used. Accordingly, it is not punishable, under the statute prohibiting the erection of wooden buildings within certain limits, and of wooden additions to buildings already erected, having in them a chimney, fire-place or stove, to make a wooden addition to a building, with the fire-place entirely without the addition. *Daggett v. State*, 100.
2. **STATUTES CONSTRUED PROSPECTIVELY.**—If a statute be not explicitly retrospective, the court will not by construction give it a retrospective operation. *Goates v. Stonington*, 121.
3. **REPEAL.**—An important public statute of long standing will not be held to be repealed, except by express words, or by strong and necessary implication. *Wilson v. Spencer*, 491.

#### STATUTE OF FRAUDS.

1. **PART EXECUTION UNDER PAROL AGREEMENT.**—When any acts are done under a parol agreement for a right of way, or other interest in land, which are prejudicial to the party performing them, and are in part execution of such agreement, it is valid, and not within the statute of frauds. *Ricker v. Kelly*, 38.
2. **SUFFICIENCY OF MEMORANDUM.**—An agreement to deliver cotton, signed by the defendant alone, is a sufficient memorandum of the contract to take the case out of the statute of frauds. *Douglass v. Spears*, 588.
3. **PROMISE TO PAY ANOTHER'S DEBT.**—If the person for whose use goods are furnished be at all liable, any promise by a third person to pay therefor must be in writing, as it is within the statute of frauds. Accordingly, where the defendant, being present with L. in a store, verbally engaged to be responsible for whatever goods a merchant should let L. have, and he let him have goods and charged them to him on his books, for which L. afterwards paid part, the promise is within the statute and void, although the merchant made the following memorandum in his book: "The above articles were delivered to L., who was introduced by J. M. C., who agreed to be responsible for what Mr. L. may want in merchandise. Credit was given on said C. becoming responsible." *Leland v. Oreyon*, 654.

4. MEMORANDUM FOR SALE OF LAND.—On the sale of land the following receipt was held sufficient as a memorandum within the statute of frauds: "Received of C. twenty dollars, being on account of a plantation on the Cypress, sold to him this day for two thousand two hundred dollars, payable in different installments, as per agreement." *Cosack v. Descoudres*, 681.
5. PAROL AUTHORITY TO SELL LANDS.—The statute of frauds does not require an authority to sell lands to be created by an instrument in writing. *Talbot v. Bowen*, 747.

See SPECIFIC PERFORMANCE, 9.

### STATUTE OF LIMITATIONS.

1. ACKNOWLEDGING DEBT BARRED.—Where the maker of a note denied his signature, but said that if it could be proved that he signed it he would pay it, and his signature was proved, it was held that this was sufficient to take the case out of the statute of limitations. *Seaward v. Lord*, 50.
2. ACKNOWLEDGMENT BY JOINT DEBTOR.—The acknowledgment by one of several makers of a joint and several promissory note takes it out of the statute of limitations as against the others. *Bound v. Lathrop*, 147.
3. SUCCESSIVE DISABILITIES.—Where a title accrued twenty-one years before the commencement of the suit, and during the infancy of the plaintiffs, their claim will be barred as against an adverse possessor, if not sought to be enforced within ten years after arriving at full age, notwithstanding the claimants were females and married during infancy, and were *femes covert* at the time suit was brought. *Thompson v. Smith*, 453.
4. ACKNOWLEDGING DEBT BARRED.—The slightest acknowledgment of a debt is sufficient to take it out of the statute of limitations. Accordingly, where a debtor referred an account to an agent for examination, it was held that this was sufficient evidence to go to the jury, as showing a promise to pay whatever should be found due, so as to remove the bar of the statute. *Burden v. McElhenny*, 570.
5. WAR SUSPENDS.—The operation of the statute of limitations is suspended between the citizens of two countries at war, while such war continues. *Wall v. Robson*, 623.
6. SEVERAL ACKNOWLEDGMENT.—The acknowledgment of one of several makers of a joint and several promissory note, that the debt is still due, is sufficient to take the case out of the statute as to the others; and such acknowledgment may be given in evidence in a separate suit against any of the others, and will be conclusive unless rebutted. *Beits v. Fuller*, 639.

See CONFLICT OF LAWS, 1; REAL ESTATE, 4, 6, 7, 8.

### STREETS.

See CORPORATIONS, 6; REAL ESTATE, 1.

### SURETYSHIP.

1. SURETIES—TIME FOR WHICH BOUND.—Where an officer, who is elected annually, gives a bond for the faithful discharge of the duties of his office, his sureties are bound only for one year, although no time is specified in the bond, and although he should be elected several years in succession. *S. C. Society v. Johnson*, 644.

See PARTNERSHIP, 2.

## TRESPASS.

1. **WITHOUT INTENTION.**—Where an injury is the immediate consequence of an act, whether it was intentional or unintentional, the doer of the act is liable in trespass. *Guille v. Swan*, 234.
2. **JOINT TRESPASS.**—If several persons co-operate in the performance of an act which occasions an injury, they are liable as trespassers, either jointly or severally, and one may be held responsible for all the damages if it appear that they acted in concert, or that the acts of the others were the natural result of the act performed by the one sued. *Id.*
3. **CONSEQUENTIAL INJURY—DAMAGES.**—Where the defendant went up in a balloon, and descending in the plaintiff's garden became entangled and called for help, whereupon a crowd broke into the garden and injured the fences and plants, it was held that the injury was the natural and ordinary consequence of the act of the defendant, and that he was liable therefor. *Id.*

See HUSBAND AND WIFE, 6.

## USAGE.

1. **PRESUMPTION OF GRANT FROM.**—A general usage, like that of depositing lumber on the banks of a river, accompanied by no claim of title, nor an intention to occupy the land in exclusion of the owner's rights, furnishes no presumption of a grant. *Bethum v. Turner*, 36.
2. **AS TO FREIGHT.**—In an action by a carrier against a consignor, for freight on rice shipped to Charleston, the defendant may give evidence of a custom in the river trade to look to the produce and consignee alone for the freight. *Middleton v. Heyward*, 554.

## USURY.

1. **RENEWAL OF USURIOUS CONTRACT.**—Where a note is given on a usurious contract, and partly paid, and a new note given for the balance, such new note is also usurious. *Warren v. Crabtree*, 51.
2. **DEFENSE OF, TO WHOM AVAILABLE.**—Where a person for the purpose of raising money, agrees with another to procure a note signed and indorsed by other parties, but not by himself, which the lender agrees to discount at usurious interest, and such note is accordingly obtained and discounted, an indorser thereon may resist payment on the ground of usury. *Id.*
3. **USURIOUS LOAN—NEW PROMISE, WHEN VALID.**—Where a judgment entered on a bond and warrant of attorney given as security for a usurious loan, was set aside without declaring the bond void, and the defendant afterwards promised to pay the sum actually lent, it was held that this promise was valid, and would support an action of *assumpsit*, and that the plaintiff would be entitled to judgment thereon, on bringing in the usurious securities for cancellation. *Early v. Mahon*, 204.
4. **IN TAKING COMMISSION.**—Where commission merchants were in the habit of receiving and forwarding to New York produce sent to them by a country merchant, and of accepting his drafts, and charging two and a half per cent. commission, in addition to interest, on advances made to meet these drafts, when he had no funds in their hands, it was held that the charge was not usurious, it appearing that it was not a cover for a



loan, and that this was the practice of other merchants engaged in similar business. *Trotter v. Curtis*, 211.

6. **USURIOUS RENEWAL OF NOTE.**—Where, upon the renewal of a note, a premium above seven per cent. is exacted, the new note is usurious, although a separate note is given for the premium. *Stewart v. Payne*, 228.
6. **IDEM—ANTECEDENT DEBT VALID.**—A usurious note given in renewal of a former valid one does not affect the antecedent debt. *Id.*
7. **TRANSFER OF USURIOUS NOTE.**—Where the holder of a note, knowing it to be usurious, transfers it to another as part of the consideration for a purchase of land, with the assurance that it is good and valid, the transferee, upon failing to recover on the note on account of the usury, may treat it as a nullity, and bring *assumpsit* against the purchaser of the land for the consideration. *Id.*
8. **AGREEMENT TO PAY FOR RENEWAL, USURIOUS.**—A person gave a note for five hundred dollars, for a valuable consideration, payable in sixty days, and when it fell due, to obtain a further time of sixty days, he gave his due bill for fifty dollars, and a renewed note for five hundred dollars, payable sixty days after date. The transaction was held usurious, and the note for five hundred dollars, as well as that for fifty dollars, was void. *Motte v. Dorrell*, 675.

#### WARRANTY.

1. **EXPRESS, WHAT CONSTITUTES.**—Formal words of warranty are not necessary to constitute an express warranty of soundness of a chattel; any direct and express affirmation of its quality or condition, showing an intention to warrant, will be sufficient. *Chapman v. Merch*, 227.
2. **SPECIAL WARRANTY.**—Land was purchased at a sheriff's sale as the property of a party then in possession. The purchaser conveyed the land with a covenant of special warranty against himself and those claiming under him, and gave a bond conditioned that he would deliver peaceable possession to his vendee or heirs at a certain date, and for ever defend against the party then in possession, and all and every person attempting to hinder the said vendee or his assigns. The purchaser recovered possession by ejectment, and delivered the possession to his vendee, who was afterwards ejected by a person claiming under the party in possession at the time of the sheriff's sale. It was held that the condition of the bond was not broken. *Miller v. Heller*, 413.

See SALES, 3, 4, 5.

#### WATER-COURSES.

1. **NAVIGABLE WATERS, RIGHT TO.**—Navigable rivers, in which the tide ebbs and flows, ports, bays and sea coasts within the boundaries of a state, and rights of fishery annexed thereto, belong to the people in their sovereign capacity, for the common use of all the inhabitants. *Arnold v. Mundy*, 356.
2. **BOUNDING LAND ON STREAM.**—A grant of land bounded on a river in which the tide neither ebbs nor flows extends *ad flum aquæ*, but a grant bounded on a navigable river extends to high water-mark only. *Id.*
3. **PROPERTY IN OYSTER BEDS.**—One who plants oysters in the bed of a navigable river, below low-water mark, has not such a property therein

that he can maintain trespass against a person taking them away, although he owns the adjacent shore. *Id.*

4. **NAVIGABLE RIVER, WHAT IS.**—The rule of the common law that only those rivers are considered navigable where the tide ebbs and flows, is not applicable to this country. A river cannot be considered navigable in which natural obstructions prevent the passage of boats of any description whatever. *Cates v. Wadlington*, 699.
5. **RIPARIAN OWNERS—RIGHTS OF.**—A river that is merely capable of being made navigable, is considered as respects the owners of lands bordering thereon as a mere imaginary line, and the claim of each extends to the center of the bed. But an individual has not such an exclusive right to a river which is capable of being made navigable, that the legislature may not declare it to be a public highway whenever the obstructions are removed, and it becomes fit for public use. *Id.*
6. **PUBLIC AND PRIVATE RIGHTS IN.**—The public may use the waters for the purpose of navigation; but that does not impair the right of the individual to the soil and use of the water, as far as is consistent with the right of the public. *Id.*

#### WILLS.

1. **PROOF OF.**—A will may be proved by one of the subscribing witnesses, if he can testify that all the solemnities required by statute were observed; if not the other witnesses must be produced, if living and within the jurisdiction of the court; and if dead, their handwriting and that of the testator must be proved, and then it is a question of fact, under all the circumstances, whether the statutory requisites were complied with. Accordingly, where only one of the subscribing witnesses was called, who testified to his own signature and the handwriting of another witness who was dead, but could not recollect any of the facts, and did not remember the testator, and it appeared that the other subscribing witness was living and within the jurisdiction of the court, it was held that the proof was not sufficient. *Jackson v. La Grange*, 237.
2. **DEVISE SUBJECT TO CHARGE.**—A devisee accepting a devise of land chargeable with a legacy, makes himself personally and absolutely liable for its payment. *Glen v. Fisher*, 310.
3. **TAKING PER STIRPES.**—Where a testator after making certain specific bequests and devises to his children and grandchildren, directed the remainder of his movable estate to be divided equally among his surviving children and "the heirs" of a deceased son, it was held that the children of the deceased took *per stirpes*, and not *per capita*. *Roome v. Counter*, 390.
4. **PROOF OF WILL, SUFFICIENCY OF.**—Where it appeared by a special verdict that one of the witnesses to a will saw the testator's name signed to the will by a third person, in the presence and by the direction of the testator, but did not hear the testator acknowledge it as his will, and that the other witness subscribed the will on the next day, and heard the testator say it was his will, without expressly acknowledging the signature, it was held that the will was not duly proved as a will of reality. *Burwell v. Corbin*, 494.
5. **ACKNOWLEDGMENT OF SIGNATURE.**—Where a testator acknowledges his signature to a will in the presence of the witness, it is equivalent to signing in his presence. *Id.*

6. **VESTED INTEREST UNDER WILL.**—Where a testator directs his real estate to be sold, and the money arising therefrom to be paid to particular persons, the interest of the legatees is a vested one, as much as if the land itself had been devised, although the executor may have a discretion as to the time of selling, and although the estate to be sold is only a remainder. *Taswell v. Smith*, 533.
7. **IDEM—DEATH OF DEVISEE.**—The death of the devisee of such vested interest, before sale, will not defeat the interest, unless so provided in the will. *Id.*
8. **LAND CONSIDERED AS MONEY.**—Where land is directed to be sold, equity will treat it as money, unless some one, having a right so to do, elect to take it as land. *Id.*
9. **REVOCATION OF WILL BY "BURNING," ETC.**—The degree of "burning, cancelling, tearing, or obliterating," necessary to constitute a revocation of a will, under the statute of frauds, depends on circumstances; the slightest "burning," etc., will be sufficient, if shown to have been done *animo revocandi*, and the fact that the statute uses the word "destroying," instead of "burning, cancelling, or tearing," does not change the case. Accordingly, if it is shown that the testator interlined and erased portions of the will, and tore off the seals, with the intention to revoke it, the revocation will be complete; and the fact that he intended at the time to make another will, but failed to do so, will not revive the former will. *Johnson v. Bradford*, 601.

## WITNESSES.

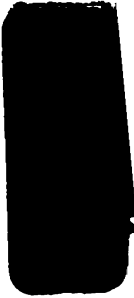
See EVIDENCE, 2, 10, 17.



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